FCC 74-297

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO., LONG LINES DEPARTMENT (A.T. & T.), REVISIONS OF WIDE AREA TELEPHONE SERVICE (WATS), TARIFF FCC No. 259 AND PRIVATE LINE SERVICE (PLS), TARIFF FCC No. 260 and THE WESTERN UNION TELEGRAPH CO., (WESTERN UNION), REVISIONS OF TARIFF FCC No. 254	Docket No. 19419

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 5, 1974)

BY THE COMMISSION:

1. On March 5, 1974, revised tariff schedules were filed by the American Telephone and Telegraph Company-Long Lines Department (AT&T) under Transmittal No. 11983 to become effective March 25, 1974.[1] These schedules revise AT&T's Private Line Service Tariff F.C.C. No. 260, by offering (a) a new type of channel conditioning designated as High Performance Data Conditioning-Type D1, applicable to Type 3002 data channels, and (b) a new Data Phone data set, designated as Type 209. The Type 209 data set is a synchronous, binary 9600 bit per second (bps) data set offered for use on a 2-point Type 3002 data channel. One of the features of the Type 209 data set is a variable speed input interface which will accept and deliver any combination of 2400, 4800, 7200, or 9600 bps customer input signals up to a maximum of 9600 bps. The tariff revisions require that AT&T's new 209 data set be used only with the new High Performance Data Conditioning-Type D1 channel. The revisions also provide for Remote Terminal Interface Arrangements to extend the interface leads of the Type 209 data set to customer terminal equipment when such equipment is located more than 50 feet from the Type 209 data set.

2. In our Memorandum Opinion and Order herein released February 7, 1972, we suspended and instituted an investigation into the lawfulness of tariff revisions filed by AT&T which, among other things, reduced the rates for certain AT&T provided data sets that were competitive with independent suppliers of data modems (33 FCC 2d 518). We stated at that time that we would consider particularly the allegations made by the independent suppliers of competing

[1] Special Permission was granted AT&T on March 4, 1974, to file these revisions on less than statutory notice to meet the service requirements of certain customers.

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modems that AT&T's rates and practices were anti-competitive. Again, in our Memorandum Opinion and Order released January 12, 1973, in the same Docket, we noted that the increased substitute rates subsequently filed by AT&T for such data sets and the charges for a new Type 208 data set offered by AT&T raised essentially the same anti-competitive questions and that the issues in Docket No. 19419 would encompass such additional questions (39 FCC 2d 637).

3. The Independent Data Communications Manufacturers Association, Inc. (IDCMA) has filed a petition to suspend and designate these revisions for hearing. In its petition, IDCMA raises certain questions, *inter alia*, concerning the use by AT&T of "incremental costs", the alleged cross-subsidization of advertising costs, the assumed useful life of the 209 data set, the alleged improper marketing practices of AT&T, and the alleged failure of AT&T to separate its channel costs and charges from its station equipment costs and charges.

4. The revised tariff schedules presently before us, whereby AT&T offers a new data set Type 209 to be used with High Performance data channels, raise essentially the same anti-competitive questions that we have previously designated for hearing in connection with other data sets offered by AT&T. Although AT&T has submitted cost and other data in support of its proposed charges for the new data set, we are unable to determine at this time that the tariff revisions now before us are reasonable and otherwise lawful. Accordingly, we are setting these revisions for hearing under the same issues heretofore specified in this docket with respect to other data sets of AT&T in order that the questions raised by IDCMA may be considered in this docket proceeding.

5. We shall not, however, suspend the effectiveness of these revised tariffs. The revisions offer a higher quality of PLS data service not now available to the public under the AT&T tariffs and we believe that the public should be able to obtain such improved service pending further hearings on the lawfulness thereof. This consideration, in our judgment, outweighs any contentions that the effective date of the revisions should be suspended in order to prevent any alleged anti-competitive effects of the new service offering. We have heretofore stated that we will not delay the institution of new competitive specialized services by existing carriers pending resolution of questions concerning the appropriate pricing and costing principles for such competitive services. *Specialized Common Carrier Services*, 29 FCC 2d 870; Page 917 (1971), and we believe that this principle should apply to the tariff offerings now before us.

6. Accordingly, IT IS ORDERED, That pursuant to Sections 201, 202, 203, 204, 205, and 403 of the Communications Act of 1934, as amended, an investigation is instituted herein into the lawfulness of the tariff schedules filed March 5, 1974, by AT&T with its Transmittal No. 11983, including any cancellations, amendments or reissues thereto; and that the issues heretofore specified in this docket SHALL ALSO APPLY to such revised tariff schedules.

7. IT IS FURTHER ORDERED, That IDCMA's Petition For Suspension IS GRANTED to the extent noted herein and OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-334

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO. Charges, Regulations, Classifications and Practices for Voice Grade Private Line Service (High Density-Low Density Rate Structure) Filed With Transmittal Letter No. 11891	Docket No. 19919

MEMORANDUM OPINION AND ORDER

(Adopted April 3, 1974; Released April 9, 1974)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND REID CONCURRING IN THE RESULT.

1. In its Memorandum Opinion and Order released January 25, 1974 (Order),[1] The Commission set forth new procedures to be followed in the conduct of the above-captioned proceeding. Rather than following the past practice of holding oral proceedings, these procedures provide for the receipt of all evidence in writing, with provision for oral hearings, if and to the extent necessary.

2. On February 5, 1974, the Bell System Respondents (Bell) filed a petition requesting the Commission to clarify and modify several aspects of its January 25 Order. Responses to Bell's petition were received from the Trial Staff of the Common Carrier Bureau, jointly by MCI Telecommunications Corporation, Microwave Communications, Inc., MCI New York West, Inc., and Interdata Communications, Inc. (MCI), jointly by the American Newspaper Publishers Association, The Associated Press, and Commodity News Services, Inc. (Press Services), and the Air Transport Association of American (ATA).

3. Bell first states that our procedures require submission of reply testimony prior to an opportunity to receive answers to interrogatories and that this "appears to be not only potentially prejudicial but counter-productive to expedition." On March 8, 1974, the Chief, Common Carrier Bureau, acting pursuant to delegated authority, modified the time table for the procedures herein to permit the filing of responsive testimony within ten days after the filing of answers to the first round of interrogatories. Further action on our part is therefore unnecessary with respect to this particular point.

4. Bell next points out that there is no procedure contemplated for the customary objection to the admissibility of material into the record.

[1] American Telephone and Telegraph Company (High Density-Low Density Rate Structure), — FCC 2d —, FCC 74-81, released January 25, 1974.

We had hoped, in adopting revised procedures for this case, that there would be no occasion for the parties to concern themselves with making formal objections to admissibility of material into the record other than at the time of the submission of proposed findings and conclusions. As in all rule-making proceedings based upon written submission, we are able to determine at the time of decision whether and to what extent material in the record is or may be irrelevant, incompetent or immaterial and what weight shall be given thereto. We are therefore reluctant to provide extra procedures that can be used by the parties to contest admissibility questions and thereby delay unnecessarily the completion of the case. We are of the opinion that no party will be prejudiced by the inclusion of material in the record herein that might not otherwise be admitted in a trial type hearing. Our decision will be based solely on evidence that is probative, substantial and relevant to the issues. Moreover, at the time of the submission of proposed findings and conclusions, we shall expect the parties to rely only upon evidence in the record that is material, competent and relevant. Any contentions concerning the admissibility of evidence can be made at that time in supporting briefs. Similarly, reply findings and briefs (which we are allowing herein), can be used to voice any objection to the admissibility of evidence. Accordingly, we shall not provide for any procedures governing the submission of objections to admissibility of evidence except as indicated above.

5. Bell further points out that no provision is made for the filing of reply findings. We agree that this would be helpful to the Commission and we will add one further procedural step to allow reply findings to be filed within fifteen days of the filing of proposed findings of fact and conclusions of law.

6. Bell concludes by stating that no provision is made for oral argument and that the Trial Staff should be separated not only from the Commission itself but from other decision making personnel, including the Chief of the Common Carrier Bureau. We believe that it is premature for us to make any ruling, at this time, with respect to oral argument. After the filing of proposed findings and replies thereto, we will give consideration at that time as to whether or not oral argument shall be held. If and when a request for oral argument is filed with the Commission, we will rule on it at that time. With respect to the separation of the Trial Staff, the Commission has stated its clear intention that:

> . . . the separation of the Trial Staff . . . was not intended to separate that staff from other personnel or resources of the Common Carrier Bureau. The Trial Staff is free to consult with any other member of the Bureau. The separation of the Trial Staff . . . simply means that such staff: (1) will not make any oral presentations to the [Administrative Law Judge] or the Commission without the other parties being present, and (2) will not make any written presentations to the [Administrative Law Judge] or the Commission which are not served on the other parties. 32 FCC 2d 89, 90 (1971).

Thus, it is intended that the Trial Staff be separated only from the Commission and the Administrative Law Judge. However, we note that our January 25 Order inadvertently provided for separation only from the Commission. We will modify our Order to make it clear

that the Trial Staff is separated from both the Commission and the Administrative Law Judge.

7. Finally, we would like to comment on certain other aspects of our January 25 Order. Paragraph 6.d of our Order requires an original and five copies of all matters submitted for the hearing record to be filed with the Commission. Questions have arisen as to whether this also applies to other documents. This provision is not applicable to other submissions, such as briefs, pleadings and proposed findings. The number of copies required for such other submissions is governed by the applicable provisions of Part I of the Commission's Rules. We are also modifying paragraphs 7.e and 7.f of our Order to allow any participant to serve interrogatories and requests for information on any other participant filing material in response to AT&T. This was an inadvertent omission from our Order.

8. In view of the foregoing, IT IS ORDERED, That our January 25, 1974 Order in this proceeding (FCC 74–81) is clarified as set forth above and is modified in the following respects:

(A) Paragraphs 7.e and 7.f are modified to read as follows:

7.e. Any participant may serve interrogatories on any other participants filing material in response to AT&T within fifteen days of the filing of such responses. Answers to such interrogatories shall be filed within twenty days of the receipt thereof.

7.f. If necessary, further interrogatories on other participants may be filed within ten days of the filing of such answers to the first interrogatories. Answers to such second interrogatories shall be filed within ten days of the receipt thereof.

(B) A new paragraph 7.i is added as follows:

7.i. Reply findings of fact and conclusions of law may be filed by any participant within fifteen days of the filing of proposed findings of fact and conclusions of law.

(C) Paragraph 10 is modified to read as follows:

10. IT IS FURTHER ORDERED, That a trial staff of the Common Carrier Bureau will participate in this proceeding and shall be separated from both the Commission and the Administrative Law Judge.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-321

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the matter of AMENDMENT TO SECTION 76.51 OF THE COMMISSION'S RULES AND REGULATIONS	Docket No. 19990 RM-2210

NOTICE OF PROPOSED RULEMAKING

(Adopted April 2, 1974; Released April 5, 1974)

BY THE COMMISSION:

1. The Commission has before it a "Petition for Rule Making" (RM-2210), filed June 12, 1973, by Blonder-Tongue Broadcasting Corporation, permittee of Subscription Television Station WBTB-TV, Newark, New Jersey. This Petition requests that the Commission institute a rule making to ascertain whether Newark, New Jersey should for purposes of the Cable Television Rules, be included in the New York, New York-Linden-Paterson, New Jersey designated television market (#1) (Section 76.51(a) of the Commission's Rules). In the alternative, the Petition requests that the Commission adopt an editorial revision to Section 76.51(a) of the Rules to add Newark, New Jersey to this designated television market. No statements in support or in opposition were filed.

2. The important considerations involved in determining which communities shall be designated as major television markets has persuaded us that resolution of this matter by editorial revision would be inappropriate. It would appear, however, that Newark does qualify for inclusion as a designated community in the market based on the standards used when the list was promulgated. Therefore, the Commission is inaugurating a rule making in this matter. The Commission invites all interested parties to file written comments on this rule making proceeding on or before May 16, 1974, and reply comments on or before May 27, 1974. In reaching its decision in this proceeding, the Commission may take into account any other relevant information before it, in addition to the comments invited by this Notice.

3. Authority for the Amendment proposed herein is contained in Sections 2, 3, 4(i) and (j), 301, 303, 307, 308, and 309 of the Communications Act of 1934, as amended.

4. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, an original and 14 copies of all comments, replies, pleadings, briefs, or other documents filed in this proceeding shall be furnished to the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its Headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-327

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the matter of MODIFICATION OF THE CONSTRUCTION PERMIT OF BOARD OF EDUCATION, BALTIMORE COUNTY, FOR NONCOMMERCIAL EDUCATIONAL FM BROADCAST STATION WSPH, BALTIMORE, MD.	Docket No. 20001

ORDER TO SHOW CAUSE

(Adopted April 2, 1974 Released April 9, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration the outstanding construction permit issued to the Board of Education, Baltimore County, to construct noncommercial educational FM broadcast station WSPH, Baltimore, Maryland.

2. Station WSPH was granted a construction permit for operation of a 10-watt station on 90.3 megahertz (channel No. 212) on March 16, 1973, nine days after a construction permit was granted to the Board of Education of Kent County for a 17.5-kilowatt station to be operated on 90.5 megahertz (channel No. 213) in Worton, Maryland. Through inadvertence, the distance between the two proposals was calculated to be 35 miles and, since on that basis no objectionable 1 millivolt-per-meter interference was indicated, both applications were granted. However, it has now been discovered that the distance between the two stations is only 19.3 miles and mutual 1 millivolt-per-meter interference is involved. (Station WKHS was granted program tests on March 15, 1974, but construction of station WSPH has not yet been completed). An application has been submitted by station WSPH to change its frequency to 88.1 megahertz (channel No. 201) on which channel there will be involved no 1 millivolt-per-meter interference with any existing or proposed stations.

3. The Commission has determined that, rather than accept and process the application for a modification of the WSPH permit, the more expeditious course to correct the error of assigning adjacent channels to nearby stations is to order the Board of Education, Baltimore County, to show cause why its permit should not be modified to specify 88.1 megahertz (channel No. 201) in lieu of 90.3 megahertz (channel No. 212) now assigned.

4. Accordingly, IT IS ORDERED, That pursuant to section 316(a) of the Communications Act of 1934, as amended, and section 1.87 of the Commission's rules, the Board of Education, Baltimore County, IS DIRECTED TO SHOW CAUSE why an Order modifying the construction permit for station WSPH, Baltimore, Maryland, to specify

operation on 88.1 megahertz (channel No. 201), SHOULD NOT BE ISSUED, and to appear and give evidence with respect to the modification of such permit at a hearing to be held at a time and location to be specified in a subsequent ORDER; said time in no event to be less than thirty (30) days from the receipt of this Order.

5. IT IS FURTHER ORDERED, That, if the Board of Education consents to the modification of its construction permit or waives its right to a hearing, the Commission, pursuant to section 5(d) of the Communications Act of 1934, as amended, hereby delegates to the Chief of the Commission's Broadcast Bureau authority to issue an order modifying the construction permit of station WSPH as proposed herein.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission send copies of this Order by Certified Mail—Return Receipt Requested—to the Board of Education, Baltimore, Maryland.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-384

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMENDMENT OF PART 76 OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO THE ADVISABILITY OF FEDERAL PREEMPTION OF CABLE TELEVISION TECHNICAL STANDARDS OR THE IMPOSITION OF A MORATORIUM ON NON-FEDERAL STANDARDS	Docket No. 20018
AMENDMENT OF PART 76 OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO AN INQUIRY ON THE NEED FOR ADDITIONAL RULES IN THE AREA OF PUBLIC PROCEEDINGS AND QUALIFICATIONS FOR FRANCHISEES—SECTION 76.31(a)(1)	Docket No. 20019
AMENDMENT OF PART 76 OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO REQUIRING ADDITIONAL ASSURANCES ON THE ESTABLISHMENT OF LINE EXTENSION PROVISIONS IN FRANCHISES—SECTION 76.31(a)(1), (2)	Docket No. 20020
AMENDMENT OF PART 76 OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO AMENDING EXISTING FRANCHISE DURATION RULES—SECTION 76.31(a)(3) TO LENGTHEN MAXIMUM TERM AND IMPOSE A MINIMUM TERM	Docket No. 20021
AMENDMENT OF PART 76 OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO AN INQUIRY ON THE ADVISABILITY OF ADDING SPECIFIC RULES TO SECTION 76.31(a)(3) REGARDING FRANCHISE EXPIRATION, CANCELLATION AND CONTINUATION OF SERVICE	Docket No. 20022
AMENDMENT OF PART 76 OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO AN INQUIRY ON THE NEED FOR NEW REGULATIONS IN THE AREA OF TRANSFERS OF CONTROL OF CABLE TELEVISION FRANCHISES	Docket No. 20023
AMENDMENT OF PART 76 OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO A SPECIFIC REQUIREMENT IN SECTION 76.31(a)(5) THAT THE LOCAL OFFICIAL RESPONSIBLE FOR SUBSCRIBER COMPLAINTS BE IDENTIFIED IN THE FRANCHISE	Docket No. 20024

Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry

(Adopted April 15, 1974; Released April 17, 1974)

By the Commission:

I. INTRODUCTION

1. On February 2, 1972, the Commission adopted the *Cable Television Report and Order* (37 Fed. Reg. 3252, 36 FCC 2d 143, *Reconsideration of Report and Order* (37 Fed. Reg. 13848, 36 FCC 2d 326). In that report we adopted a comprehensive set of new rules for most aspects of cable television operation. The report was separated into four main categories:

Television broadcast signal carriage;
Access to and use of non-broadcast cable channels, including minimum channel capacity;
Technical standards;
The appropriate division of regulatory jurisdiction between the federal and state-local levels of government.

Particularly as to the last three categories, we stated repeatedly that new regulatory concepts and procedures were being employed and that many of these rules were experimental in nature and would be clarified, modified, or changed as the situation warranted. The rules were an attempt to create a flexible regulatory framework that took into account the constant and necessary flux inherent in any emerging industry such as cable television. The time has come, after two years of operational experience, to make some modifications and clarifications of our rules to keep pace with the changing picture presented by cable's development and to resolve whatever ambiguities may exist.

2. Our interest in the development of cable television is not passive. While the bedrock of our regulatory authority over cable clearly derives from its use of broadcast signals (see *U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157, *Midwest Video* v. *U.S.* 406 U.S. 649), this is not where our concern ends. This Commission is primarily responsible for the development and maintenance of a nationwide communication system (Communications Act of 1934 As Amended, Sec. 1). Cable television is undeniably part of that system and presumably will become a major and integrally vital element of what many see as the broadband communications system of the future. We are concerned that we do not, in our efforts to mold the communications structure of the future, unduly hamper the developing structure of today. Over-expectation and anticipatory regulation can be just as damaging, if not more damaging, than no regulation at all.

3. The need for flexibility in our rules and a willingness to modify them as needed is best illustrated by the technological changes that have occurred within the past two years. In this relatively short time span, we have seen the development of cable television converters that have nearly doubled the maximum channel capacity. Satellite transmission to cable systems has become a technical reality. Two-way subscriber response systems have moved from the drawing boards to test

installations. Any regulations of cable television must be designed with enough flexibility to allow for these changes.

4. Two years of experience in administering our rules has also given us the opportunity to pinpoint the weaknesses, identify the areas creating undue confusion or misinterpretation, and catalogue our own mistakes. This process of refining our rules was significantly aided by the reports submitted to us by the special Federal/State-Local Advisory Committee [FSLAC] that was established for this purpose when we adopted the *Cable Television Report and Order* 37 Fed. Reg. 3252 at 3277, Para. 188. That Committee spent more than 250 hours in public meetings debating many of the issues we will deal with here. In many cases, the clarification we are providing today is in response to the confusion or need for more specificity highlighted by those meetings. The final report of the FSLAC Steering Committee [1] has been thoroughly reviewed by this Commission prior to the preparation of this document. The review included a special meeting held between the Steering Committee and the full Commission in public session on December 11, 1973. The actions we are taking today are not intended to be dispositive of the FSLAC report. That report did provide valuable guidance, however, in the preparation of this document. We expect to continue work that has already been initiated relating to the FSLAC recommendations, and future actions based on the FSLAC report will be so noted.

5. We are issuing this clarification and suggesting modifications only after a great deal of careful study and two years of experience with the present rules. Many interrelated rule making proceedings and requests for waivers, special relief, or declaratory rulings have been received during that time. Some of those pending requests will be either resolved or modified by our action today.

6. This document is intended to both clarify our existing rules and policies and at the same time open new inquiries where appropriate. In areas where a new rule is proposed or the change suggested goes beyond clarification or non-substantive modification, we have so noted it by specifically inviting comments and assigning a docket number to the issue. As in all other notices of proposed rule making and inquiry, comments are invited from all interested parties. We emphasize in this regard, however, that we intend to act expeditiously on these matters. While many of the issues considered today cross the subject matter categories employed in the *Cable Television Report and Order*, we will attempt to deal with them within that framework to maintain continuity.

II. TELEVISION BROADCAST SIGNAL CARRIAGE

7. We do not intend to suggest any modifications in our signal carriage rules at this time. Several rule makings are outstanding (i.e., non-duplication RM–2275, Docket No. 19995) and will be dealt with in due course. However, some general comments on signal carriage, particularly as it relates to other issues in this report, are appropriate.

[1] The final report of the Steering Committee of the FCC Cable Television Advisory Committee on Federal/State-Local Regulatory Relationships is available for $6.50 from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22151, Order No. PB 223–147.

Signal carriage jurisdiction

8. The fact that this Commission has pre-empted jurisdiction of any and all signal carriage regulation is unquestioned. Nonetheless, occasionally we receive applications for certificates of compliance which enclose franchises that attempt to delineate the signals to be carried by the franchisee cable operator. Franchising authorities do not have any jurisdiction or authority relating to signal carriage. While the franchisor might want to include a provision requiring the operator to carry all signals allowable under our rules, that is as far as the franchisor can or should go. In fact, because of the complexities of our signal carriage rules, even that statement in a franchise could be troublesome. We have been faced in some instances with the unfortunate situation where, because the franchise included signal carriage requirements inconsistent with our rules, we were forced to delay the grant of a certificate awaiting amendment of the franchise. In other cases, where the franchise included a severability clause, we were able to grant the certificate. Even in those instances, it would have been preferable had the franchising authority omitted the signal carriage clauses altogether.

Leapfrogging

9. We note that a further suggestion on signal carriage was made by the Federal/State-Local Advisory Committee final report submitted by its Steering Committee (hereinafter referred to as the FSLAC Report). The report designates over-the-air signal carriage as Issue #19 and states:

> Signal carriage requirements are and should remain in exclusively federal jurisdiction. Additionally, the Committee recommends that when there is a joint petition by the cable operator and the franchising authority for a waiver of the leapfrogging rules based on a showing of community interest, the Commission should give additional weight to such petitions in considering the waiver request.

We agree with this position and have adopted it in some cases presented to us. (See *Commission on Cable Television of the State of New York*, 43 FCC 2d 826, FCC 73–1148, CSR–342). We intend to continue investigating such waiver requests on an *ad hoc* basis, and, as noted in the above-cited case, as we gain more experience in this area, we may consider appropriate amendments of our leapfrogging rules (Section 76.59, 61 *et. seq.*) to accomodate the carriage of in-state signals in some or all situations.

Signal deletion

10. Several procedural changes have also been suggested in this area, particularly as they relate to applications for certificates of compliance. In Section 76.13(a)(1) and (b)(1), we require indication of the signals an operator is authorized to carry as well as specification of the signals requested to be added to that authorization. In many instances, this has led to situations where there are clearly many more signals authorized than could technically be carried or are desired. We intend to amend this rule to require that the applicant indicate, when applicable, what signals should be deleted from the authorization as well as added.

11. We recognize that, in many cases, the reason there are more signals authorized than can technically be carried is that some of those signals are only carried in part. This is consistent with Section 76.55 (b) which simply requires that a particular program may not be altered or deleted in part. The carriage of signals not required by our rules is left to the discretion of the cable operator. In those cases, however, where signals are going to be dropped completely, we want to be apprised. A procedural change in Section 76.55(b), should be sufficient to accomplish that result.[2]

III. ACCESS TO AND USE OF NONBROADCAST CHANNELS

12. A comprehensive and innovative set of new rules regarding cable television access channels was adopted in our 1972 regulations. In the *Report and Order in Docket No. 18396 et al.*, we clearly stated the basis and rationale for these new rules:

> Broadcast signals are being used as a basic component in the establishment of cable systems, and, it is therefore appropriate that the fundamental goals of a national communications structure be furthered by cable—the opening of new outlets for local expression, the promotion of diversity in television programming, the advancement of educational and instructional television and increased informational services of local government. (Para. 121.)

13. We reiterated this over-all concern for the development of cable television in the reconsideration of the *Cable Television Report and Order*, 37 Fed. Reg. 13848, 36 FCC 2d 326:

> . . . Cable Television, as it grows, must be integrated into a nationwide communications structure. Were we to permit an uncontrolled development of cable we would be breaking our obligations under the Communications Act of 1934, as amended. This Commission was created, amid the chaotic development in the field of radio, . . . to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communications service. . . . (Section 1, 47 USC 151). As "an integral part of interstate broadcast transmission," cable operators "cannot have the economic benefits of such carriage as they perform and be free of the necessary and pervasive jurisdiction of the Commission" (*General Telephone of California* v. *FCC*, 413 F 2d 390, 401 (C.A.D.C.) (1969), cert. denied, 396 U.S. 888. Thus, we conceive it to be our obligation to consider the actual and potential services of cable television and create a Federal policy which insures that these services can be distributed equitably, on a nationwide basis as merely one link in our communications system. . . . (Para. 74.)

From watching the development of our access program, we are now, more than ever, convinced of the propriety and need for such a program. Access is still in its infancy and it has a long, hard struggle ahead before it becomes an accepted part of the communication process in this country. We knew this would be the case when we instituted the rules noting:

> . . . We recognize that in any matter involving future projections, there are necessarily certain imponderables. These access rules constitute not a complete body of detailed regulations but a basic framework within which we may measure cable's technological promise, assess its role in our nationwide scheme of communications, and learn how to adapt its potential for energetic growth to serve the public. (Para. 117.)

[2] Formal action to effect this procedural amendment will be announced in a separate Commission document.

14. We believe that the access channels we have required will eventually serve the public in many ways. However, we are also aware that the requirement for providing these channels imposes a burden on the cable operator, particularly on the small, older systems now required to provide access channels and the new large systems that provide services to many small communities. We also note that many franchisors outside the major markets are now including access requirements in their renewal proceedings.[3]

Access on conglomerate systems

15. For the most part, our access channel requirements do not appear to be overly burdensome. To date we find no reason to alter the rule requiring at least four access channels (public, educational, government, and leased). The application of that regulation, however, must stand on a flexible and reasonable basis. One issue that is being raised in this regard, and which we wish to clarify here, is the effect of the rule in multi-jurisdictional systems. In the *Cable Television Report and Order*, we stated that ". . . To the extent that the access requirements pose problems for systems operating in small communities in major markets, such systems are free to meet their obligations through joint building and related programs. . . ." Our intent here is to make clear that we have and will continue to entertain petitions and special showings to allow the joint use of access channels and facilities. (*e.g.*, *Century Cable Communications, Inc.*, CAC–1914, FCC 74–63.) There is no need, as we see it, to require a system providing service to a large number of small suburban communities to have a separate public access channel for each one of those communities when in reality none of those access channels is or would likely be fully utilized. In fact, in such a situation, it might be better, in terms of fostering public access channel use, to have one or two channels significantly used and "lit" rather than a multiplicity of channels "dark" for a major portion of the time because of scarcity of programming. On the other hand, we want again to put all cable operators on notice that although we may grant waivers of immediate provisions for access channels we still expect and will require operators to have sufficient channel capacity to meet any reasonable demand.

Channel capacity

16. Questions arising out of our channel capacity rules (Section 76.251(a)(1)) also indicate that clarification is necessary. Our efforts to establish minimum/maximum channel capacity requirements were based on a study of the existing technology at the time of the adoption of those rules. We were attempting to indicate to the industry that they must have sufficient channel capacity to meet forseeable future demands, and, at the same time, we were cautioning franchising authorities that requiring excessive technological capacity was detrimental to our overall program. A "20-channel" system, in essence, requires construction that is sufficient for any currently forseeable

[3] We allow the addition of such requirements in smaller market franchises so long as they are consistent with and no greater than our rules for the major markets. See *Cable Television Report and Order*, 37 Fed. Reg. 3252, at 3272, Para. 148, Section 76.251(b).

demand; that is, single cable with converter, dual cable, or eventually dual cable with converter. We continue to be of the opinion that this is sufficient. We note that some communities have contemplated requiring massive extra bandwidth provisions, such as operational capacity for 120 video channels. The present need or value of such excess has yet to be proved. Apparently the theory is that many discrete groups could thereby each have their own separate access channel. However, it appears from current experience that, for now, the more successful access experiments are those where a cooperative effort is made by many groups to fill an access channel. The advantage of such cooperation is that it results in the channel's use for a substantial portion of the day so that viewers become accustomed to seeing programming originate on the channel as a normal course of events rather than as an occasional special event. The provision for special access channels for various discrete groups may, we fear, work to their detriment in that rather than pooling their efforts to program one channel, each will go its separate way and ultimately none may succeed. We envisioned and continue to promote the concept of pooled facilities. For instance, the school systems in a community should be able to cooperate to program an educational channel. Their time and resources would be better spent and more effectively utilized by joint effort than by each demanding his own channel and then not being able to fully utilize it.

Facility requirements

17. Our access program, and the burden it imposes on the cable operator, has been carefuly weighed and we consider it to be both reasonable and in the public interest. We are requiring the provision of free access channels and some facilities to utilize them. We envision this access program as an opportunity for a multiplicity of persons and groups to become active in the use of the communications media for the first time. For access channels to work the individuals and groups being offered access must design their own programs, develop their own resources, and foster the use and value of the channels. This is not accomplished by demanding that the cable operator, having provided the free channels, should now also pay to program the channels. An unfortunate misconception seems to have developed because of some over-expectations at the prospect of free access channels. Demands are being made not only for excessive amounts of free equipment but also free programming and engineering personnel to man the equipment. Cable subscribers are being asked to subsidize the local school system, government, and access groups. This was not our intent and may, in fact, hamper our efforts at fostering cable technology on a nationwide scale. Too often these extra equipment and personnel demands become franchise bargaining chips rather than serious community access efforts. We are very hopeful that our access experiment will work. We recognize the difficulties inherent in developing access programming and will have more to say on the subject later. We do not think, however, that simply putting more demands on the cable operator will make public access a success. Access will only work, we suspect, when the rest of the community assumes its responsibility to use the opportunity it has been provided.

18. In order to clarify the meaning and intent of our access requirements, we will review them here as they appear in our rules:

19. Sections 76.251(a) (1) and (2), as noted earlier, are meant to assure that any new cable system being built is designed with sufficient capacity for any forseeable future demand. We think these rules adequately meet that goal and see no need to modify them. It should be noted, however, that we recognize that in some cases strict application of these rules would not be reasonable. This is particularly true where, because an older system is already carrying a great number of grandfathered signals, or a new system must carry a large number of "local" stations, a system would have to have an inordinately large channel capacity in order to double its bandwidth pursuant to Section 76.251 (a) (2). We will continue to entertain waiver requests in such circumstances. This does not mean, however, that a waiver will be granted to allow a system to continue operating without any extra capacity. All systems covered by our rules will have to have sufficient capacity to meet their access obligations and have some capacity left over for future use. Waivers will be granted in instances where the extra capacity required by the rule would appear to have no forseeable relationship to future demand.

Bandwidth activation requirements

20. Some questions have been raised as to when the extra bandwidth must be activated. Some systems claim 20- or 24- or 26-channel capacity by having the capability of installing converters on a single trunk system. We have occasionally been asked when that converter must be installed. Our application of this rule is purely pragmatic. The rule requires bandwith ". . . available for immediate or potential use. . . ." No system will receive a certificate of compliance if its activated capacity is insufficient to meet our access requirements (including at least one channel available for leased use). So long as the system always has that much immediately available and usable capacity, it will be considered in compliance with our rules, assuming, of course, that the remaining capacity can be activated without significant rebuilding or delay.

Channel activation

21. In this regard, we believe it is necessary to clarify the language of the channel expansion formula in Section 76.251(a) (8) of the rules. This Section requires that a new designated access channel be made available when the first channel is in use for a specified period of time. The "time trigger" (channel use for 80 percent of the time during any consecutive three-hour period for six consecutive weeks) applies to each channel individually. For instance, if the public access channel is filled to that degree, a new public access channel must be designated upon request regardless of the amount of use being made of the other access channels. Additional special designated channels need not be provided free of charge. Reasonable charges consistent with our access policy can be assessed so long as the free channel in each category remains available on a non-discriminatory basis.

Two-way

22. In Section 76.251(a)(3), we require that the technical capacity for non-voice return communication be designed into any new cable facility affected by the rule. We fully explain the rationale for this requirement in Paras. 128, and 129 of the *Report and Order*. This rule does not require that the cable system be operational in the return mode. Once again, as in the case of channel capacity, we want to make sure that new systems being built will be able to meet all present and foreseeable future service obligations without the need for significant rebuilding or delay. We are aware that at present there are few, if any, proven, economically viable uses for two-way cable communications. To require operational two-way systems at this time, therefore, might impose unreasonable costs on the cable operator. In some cases, we have noted that franchising authorities are requiring the immediate operational installation of two-way facilities. Before a certificate of compliance is granted in any such case, we require a showing of the intended use of such facilities and a showing that such a requirement will not adversely affect the system's viability or otherwise inhibit it from complying with the federal goal of a nationwide cable communications grid.

Privacy

23. Many questions and fears have developed about the use of two-way equipment. In this regard, the statement made in the FSLAC Report is most appropriate:

> **The issue of privacy and its relationship to the legitimate uses or potential uses of cable television is a highly emotional one. The fears of many, that cable television will bring with it "1984-type" surveillance and monitoring is in the public mind regardless of the technological factors that argue against such uses. These fears must be met. At the moment, the potential for over-reaction to such fears and the inclusion of impractical and prohibitive allegedly protective requirements in franchises prompts the Committee to suggest that: Protection of subscriber privacy may take the form of regulation and judicially enforceable sanctions, and may be addressed at federal, state or local levels. The Committee believes that the principal problem area relates to the individualized monitoring of subscriber viewing habits, without explicit advance consent, and the disclosure of such information. Restraints on such activity should not impede system-wide, non-individually addressed "sweeps," or the operator's acquisition of information for purposes of verifying system integrity, controlling return path transmissions, or billing for pay services.**

24. We agree fully with the Committee on this point. Without denigrating the well-intentioned pleas for caution voiced by many groups, we feel that there has been much misinformed over-reaction to this problem. Some franchises have included provisions to guard against monitoring that are not only impractical but often impossible to comply with. Other provisions have been included which purport to prohibit activities by the cable operator, such as generalized performance "sweeps," which are necessary to assure system integrity. Equipment to "monitor monitoring" has been required that does not even exist. It should be sufficient at this time to caution franchising authorities against excessive regulation in this regard. We are watching this situation carefully and will take any action necessary to protect the privacy of cable subscribers. Such action may take the form of added

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regulations at the agency level to assure privacy or possibly even Congressional action.[4] All governmental jurisdictions should be on guard to guarantee that the right of privacy is maintained. As we noted when we instituted the two-way requirement, any use of two-way communications, any activation of return service must always be at the subscriber's option (Para. 129).

Free channels

25. In Sections 76.251(a)(4), (5), and (6), we require the provision of public, educational, and governmental access channels. We continue to view these channels as experimental. After only two years of experience with these rules, it would be premature to characterize the experiment as a success or failure. We would prefer more experience before significantly changing these requirements. Once again, however, it appears necessary to reiterate that until we can gain more experience with the experiment already under way, we are reluctant to allow major alterations by individual franchising authorities without good cause. Unquestionably, in some areas, because of particular local needs and facilities, different access programs might be useful. In those cases, we will entertain petitions for waiver of our general rule. To date, however, we have received several applications for extra access channels and equipment on the "more is better" concept rather than on any actual need or plan for use. As we have already noted, "more" may not be better, and, indeed, may be worse. Any proposals in franchises requiring access channels or facilities in excess of what is required in our rules must be shown to be reasonable and necessary for a planned local program of use. A showing in the application for a certificate of compliance must be made that indicates what the nature of the added requirement is, how it will be implemented, who will pay for the extra services and equipment, how much they will cost, and how the costs, if borne by the cable operator, will add to rather than detract from his overall service offering.

Access channel regulation

26. As to the actual plans for use of the access channels we have required, We want to emphasize that there is a great deal of flexibility. Different communities, operators, and access groups will find various ways of utilizing their channels most effectively. We expect that many variations will be tried. It would be a mistake for any regulatory authority or board to attempt, at this formative stage, to delimit too particularly how the access channels should work.

27. Our effort at creating a public access channel was meant to give the maximum access possible to local groups. It is for this reason that we initially described the channel as one that should be available on a "first-come, first-served non-discriminatory" basis. The best example of why we say that it is premature to establish firm rules for the access channel is the myriad number of questions we have been asked arising from that statement. By attempting to answer some of them here, we hope to clarify the policy considerations behind our access rules.

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[4] We note that the recently released report on Cable Television by the President's Cabinet Committee on Cable Communications also suggests that the guarantee of privacy be one of our principal concerns.

28. Some have questioned whether our rules would allow a particular person or group to reserve access channel time on a long-term basis, e.g., every Thursday night from 8 to 9 p.m. We did not intend that our rule would prohibit an access programmer from developing a viewership at a particular time by consistent programming. Therefore, this type of reserved time would be consistent with our rules. However, we also want to assure that all desirable time slots are not "frozen" and thereby monopolized or not available to the occasional programmer. Some balance is necessary. We are allowing cable operators to design their access channel rules to accommodate both interests and shall remain sensitive to the possibility that abuses might develop.

Educational access

29. Our educational access channel rules were designed to promote the use of that channel by educational authorities in the community. Much was claimed in the original dockets which led to the adoption of this rule about the potential for educational channels on cable. Little has developed. In retrospect, it appears that our limitation of one free educational access channel was wise. Designating vast channel capacity for education only to see it lie fallow serves no purpose. Two questions have repeatedly been raised about our educational access rules: 1) who qualifies as an "educational authority" to use the channel, and 2) what extra equipment, assistance, etc., can be demanded or offered for educators in a franchise agreement?

30. Our concept of "educational authority" was not meant to restrict the use of this channel to the local public school board. Any school, college, or university, public or private, formal or informal, should have the opportunity to air programming on this channel. The one exception to this interpretation would be commercial educational enterprises (computer schools, beauty schools, etc.) that would in essence be using the channel for advertising which we have specifically disallowed on the educational access channel. Any bona fide educational interest should have access to the educational channel. We envision a working educational channel as one where the programmers work out a reasonable schedule among themselves and with the cable operator to utilize this opportunity offered to them. It might be possible, for instance, for a high school and a college to produce complementary instructional programming of benefit to both. It is not the cable operator's responsibility to program this channel nor should he be expected to.

31. The problem of increasing demands in franchises for extra channels, money, equipment, personnel, etc., will be dealt with in Section V of this document.

Leased channels

32. It is too early to discern any trends regarding our leased access channel rules (Section 76.251(a)(7)). It remains our intent to keep these channels as free as possible from any regulation that might restrict or artificially alter their growth. This is particularly true in the area of rate regulation. We have pre-empted this area with the explicit purpose of allowing the market place to function freely. We note that many authorities are already talking about regulating leased channel

rates and/or rates for pay cable services. It is premature to regulate along these lines. Such regulation might destroy any chance for this emerging communications service by stifling competition, setting incorrect rates, and establishing an atmosphere which deters experimentation, innovation, or speculation. We have pre-empted this area to avoid those pitfalls. It is unclear how a regulatory body could now establish reasonable rates for services that are untested, unproven, and which have not even established a consistent record as to costs, expenses, subscription, etc.

33. As we noted, in the *Cable Television Report and Order*, Para. 130, 131, dual jurisdictional regulation of access channels would cause great confusion and might inhibit their growth on a nationwide basis. Different regulation, rate structures, etc., for instance, on channels where a per program or per channel charge is made might unduly hamper the obviously interstate effort involved by cable operators and programmers to secure a large enough audience to make this new communications medium a viable economic success. We cannot allow such a multiplicity of regulation to detract from our national program.

34. While we have decided to prohibit non-federal rate regulation of leased channel uses or users at this time and have further announced our intention of refraining from imposing any federal regulations now, some guidelines regarding leased channel operation might be helpful. We recognize that many of the early efforts at rate regulation were motivated by concerns over potential abuse of the cable operator's position. We noted such a potential in the 1972 rules (Para. 126). To date there has been little evidence that the cable operators are hoarding capacity for their own uses or are setting preferential or prohibitive rates to maintain a monopoly position. Should such a situation develop, we will, of course, stop it. It is in the cable operator's best interest for this not to happen. All parties must be given access to the leased channels at rates not designed to prohibit entry. This is especially true in the area of pay cable. Evidence that cable operators are restricting entry would obviously lead to demands that cable be redefined as a common carrier. We do not think this would be a good idea at this time. In fact, it would probably be detrimental.[5] But abuse, particularly of leased channel access, will surely result in far more restrictive regulation.

35. Some cable operators and franchising authorities have suggested a program whereby preferential rates for leased public, educational, and governmental channels are offered to non-commercial users. Thus, when the free channels are filled, or when, for instance, an educational user wants to put specialized programming on a separate educational channel, he could lease a channel at a lower rate than would be available to a commercial user. This concept appears sound, and we do not discourage cable operators from experimenting with such preferential rate structures. Specific franchise requirements or controls of this nature, however, remain pre-empted. We favor a market place experimentation in this area for now.

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[5] This, of course, is consistent with the position we took in the *Cable Television Report and Order*, Para. 146. It does not mean that at some future time, once cable technology has sufficiently matured, that common carrier status would necessarily still be inappropriate. We note that the same position has now been taken by the President's Cabinet Committee on Cable Communications.

IV. TECHNICAL STANDARDS

36. We repeatedly stated in the original cable rules and in the reconsideration of them that our technical standards were only a first step in what we expected would be a long process of refining the technical parameters of cable television. In the *Reconsideration of Cable Television Report and Order*, we indicated that franchising authorities could also promulgate technical standards. That decision has now been brought into question.

37. The FSLAC report, while acknowledging an apparent problem regarding unrealistic standards being developed at state and local levels, recommends that this dual jurisdictional approach be maintained at least until the completion of the FCC Cable Television Technical Advisory Committee's (CTAC) work. However, the FSLAC report also recommends (Issue #4) that we issue cautionary advice to franchising authorities noting that our rules should suffice in a majority of cases and that any more stringent standards must be enforced locally. This recommendation also urges that we retain oversight authority to deal with any unrealistic standards that may be promulgated.

38. We recognize that this is an area of significant conflict. The experience we have already gained from CTAC's preliminary work and the confusion engendered by some of our original rules indicates that much more work needs to be done. Our technical advisory committee is making progress in this direction.[6] Most State Governors have already named liaisons with the Committee at our request so that we may coordinate as much of this activity as possible. The question now arises as to whether we should institute, at the least, a moratorium on the promulgation of non-federal technical standards until the completion of CTAC's work.

39. A petition for rule making has already been received from the National Cable Television Association regarding technical standards pre-emption,[7] and the opinion of our own Office of Chief Engineer suggests that the multiplicity of conflicting technical standards has become a problem and might not be in the public interest. There has been considerable comment on the desirability of uniform standards and argument that the lack of such uniform standards could conceivably hamper the development of cable television because technical equipment could not be manufactured for nationwide use.

40. Understandably, the imposition of a moratorium or the complete subject matter pre-emption of technical standards are issues of considerable debate. For the reason, we invite interested parties to submit comments on the question of whether cable television technical standards should be totally pre-empted or a moratorium on additional non-federal technical standards should be imposed until the completion of the technical advisory Committee's work.[8]

[6] The Committee expects to complete the first phase of its work by late this year.
[7] RM–2196 *Petition for Rule Making to Standardize Technical Standards* filed May 23, 1973, by the National Cable Television Association.
[8] Comments filed in response to this *Notice of Proposed Rule Making* should be referred to Docket No. 20018.

V. FEDERAL/STATE-LOCAL RELATIONSHIPS

41. In our 1972 rules we adopted an ambitious program of creative federalism in the area of cable television franchising. In essence, we developed an approach of dualism toward the granting of cable franchises. We recognized that the complexities and national character of cable television called for nationwide rules and guidelines. At the same time, we acknowledged that the essentially local service offered by cable television, at least in its formative stages, could best be developed through local participation and enforcement. Our rules attempted to blend these needs into a cohesive, cooperative program between federal and local authorities. This effort appears to have been basically successful.

42. One significant new development, however, has become a complicating factor. State governments have begun asserting a regulatory role in cable television, thus adding a third-tier to the regulatory scheme. When we adopted our rule we envisioned a system whereby federal rules and guidelines would be complemented by one other regulatory authority—the so-called "local" level of government. We did not specify cities or municipalities because we recognized that in some states the state government would serve as the "local" authority rather than some smaller political subdivision. Indeed, this was the case in 1972, since several states had already asserted state jurisdiction over cable franchising (e.g., Connecticut, Nevada, Rhode Island, and Vermont). However, at that time there were no states asserting an additional regulatory function while leaving other regulatory and franchising matters to localities. It is this latter development that concerns us. A major portion of the FSLAC report deals with this "three-tier" problem (see Part II, FSLAC Final Report). In our December meeting with the FSLAC Steering Committee this was also a prime topic of discussion. We intend, in the near future, to deal with this question specifically. For the purposes of this document, however, it should be sufficient to caution all regulatory bodies involved or considering involvement in cable television that we are concerned about the developing duplicative and burdensome overregulation of cable television.

43. The purpose of this Notice of Proposed Rulemaking and Memorandum Opinion and Order is to clarify and in some cases modify the existing rules. Our experience to date indicates that one of the areas most in need of clarification is our franchise standards and their relationship to the rest of our rules.

44. Once again, we think it would be easiest to review all of our franchising standards here in the order that they appear in the rules. For present purposes, the use of the term "local" authority should be read as referring to the local or state authority, whichever is appropriate in the particular jurisdiction. Generally, we assume that whichever non-federal authority grants the franchise will also be responsible for complying with all the other franchise-related aspects of these rules.

Franchising authority

45. In Section 76.31(a), we require that cable operators in order to receive a certificate of compliance, must have a ". . . franchise or other appropriate authorization." In most cases, this has not caused any difficulties. It is not necessary that the document in question be called a "franchise." Depending on the laws of the particular jurisdiction, the authorization may take the form of a franchise, franchise and ordinance, license, permit, certificate of convenience and necessity, etc. The point is that documents must be provided showing that authorization from the appropriate local authority or authorities has been granted to the applicant to build a cable television system. This authorization must be complete before we will process an application for a certificate of compliance. The applicant must be in the position of being able to begin operation or construction immediately upon receipt of a certificate of compliance. All local and state processes (if any) must be completed before we will certify that an applicant has complied with our rules. It would be administratively burdensome and unnecessarily time consuming for us to process applications only to find that the applicant failed to secure full local approval to build and operate a proposed system. We will not process an application at this time which contains only the municipal franchise if the applicant is required by state law to also have state approval of the franchise.

46. We have had some difficulty when there is apparently no appropriate authority in the state empowered to grant a franchise. To date, we have, consistent with paragraph 116 of *Reconsideration*, granted certificates in such cases when an appropriate alternative proposal is supplied. We do not like this procedure but see no way around it so long as some states delay designating the appropriate local jurisdictional authority. It should be reiterated, however, that before we will proceed with an application claiming that there is no local authority capable of issuing a franchise or other appropriate authorization, we expect formal statements to that effect from the local authorities. We have no desire to become involved in the interpretation of state laws. We assume the regularity and accuracy of local official interpretation of state law unless specifically shown otherwise. We would urge, however, that in the few remaining areas where this problem still exists it be clarified at the state level in the near furture.

47. Another, although less frequent problem, has come to our attention where a franchising authority, while apparently having the authority to grant a franchise or other appropriate authorization consistent with our rules, declines to do so. Alternative proposals by the cable operator in such cases will not be accepted. Where a franchising authority has the power to comply with our rules but does not, a certificate of compliance will not be issued.

Franchise standards

48. Section 76.31(a) also requires that the franchise contain ". . . recitations and provisions consistent with the following requirements." This has caused problems in cases where, although our

rules were indeed followed, the fact that they were was not stated in the franchise. We have allowed applicants to remedy minor deficiencies by official communications from franchising authorities, thus avoiding the time consuming process of franchise amendments. Such a less formal process has allowed us to administer our rules with flexibility and will be continued. This is not to say that substantive omissions can be corrected in this manner.

49. In cases where, for instance, a statement that a full public proceeding was held was not included in the franchise and we find that such a proceeding was in fact held, we will not reject the application. Of course, franchising authorities and applicants would be wise to comply totally with the letter of our rules. We are simply stating here that we intend to apply our rules reasonably and see that their intent is followed even if, in some instances, their particulars are not. As always, such decisions will be made on a case by case basis, and, of necessity, such consideration will unavoidably slow the certificating process.

Franchisee selection—Public proceedings

50. We think that the intent of Section 76.31(a)(1) is clear. Prior to the selection of a franchisee, we expect the franchising authority to investigate the applicants' legal, character, financial, technical, and other pertinent qualifications. We also require that the public be given the opportunity to become involved in this process. There are many ways that this can be done. Many of the larger cities have had comprehensive hearings on the design of a cable ordinance. Others have established citizens' committees which held open publicized meetings and reported back their findings to the local authorities. Smaller localities, as a rule, have confined the process to their regular city council meetings. All of these methods are presently acceptable.

51. The purpose of our present rule is to assure that the public has been given notice and a right to be heard regarding the development of cable television in any particular area. We, of course, cannot guarantee nor would it be possible to require that all public input be heeded or adopted. We do not intend to act as a "court of last resort" for those who disagree with the decisions of their elected officials. Our present requirement for public proceedings is administered on the basis of a "reasonable man" standard. So long as the public has been given a reasonable opportunity to participate in the franchising process, we currently consider our "public proceeding" requirement as having been met. We presume the regularity of action by local officials. Except in the extraordinary case, if local officials assure us that they have made appropriate investigations of the franchisee's qualifications and that the public has had an opportunity to participate in the process we will not delve further into the particular methodology or decision factors in any specific franchise grant.

52. Some have argued that we should strengthen these rules. The FSLAC report (Issue No. 2) recommends that we articulate minimum due process standards. The National Black Media Coalition (RM–2278 filed November 12, 1973) makes a similar request and suggests further that we adopt very specific notice and time require-

ments for public meetings. There have also been suggestions that we require specific information that should be requested or given to franchising authorities prior to the selection of a franchisee.

53. We are not sure that such an approach is practical in the dual jurisdictional program we have set out. We recognize that the procedures for granting franchises differ in the various jurisdictions. There are questions whether such procedures are susceptible to nationwide regulation or whether the procedures as well as the general inquiry into the qualification of franchise applicants would better be left to local officials. We invite any interested party to comment on these questions.[9] Should more specific rules be adopted to articulate the appropriate public proceedings required prior to the selection of a franchisee (type and length of notice, etc.)? Should franchising authorities be given specific guidelines and requirements on the information to be considered prior to the selection of a franchisee? And in either case, if the answer is yes, what should the guidelines or recommendations be and how should they be enforced?

54. Of course, while we proceed in this inquiry, our "reasonable man" doctrine will remain in effect. By way of advice to authorities preparing to embark on the franchising process, particularly in the larger urban areas where there is a great deal of citizen interest in cable, experience suggests the following:

Publicly announced meetings specifically on the topic of cable television are most helpful. These meetings can be used to educate both the citizens and the city officials on precisely what cable is and is not and how cable relates to the needs of the particular locality.

Specific procedures for granting the franchise should be established, published, and followed. It should be noted that, as has already happened in several cases, not following to the letter a municipality's own rules can cause considerable delay and acrimony.

Cities that have initially established an ordinance on cable television and have approved it without looking first to who will receive the franchise have found this to be a beneficial procedure avoiding many of the pitfalls involved in an unrealistic bidding contest on a combined franchise and ordinance. Such bidding contests, with cable operators and city officials offering or demanding provisions unrelated to the actual needs of the city or viable operation of the system, are harmful to all parties.

An open, written bid proposal by all applicants is helpful but care should be taken lest this become another form of bidding contest. It should be noted by cities and franchisees alike that whenever a franchise application is incorporated by reference in a franchise it must be made part of the application for certificate of compliance from us. It will be reviewed for compliance with our rules in such a situation.

55. The process of soliciting bids for a cable television franchise often leads to excesses in both demands and offers. As we just noted, any bid application incorporated by reference in the franchise will be reviewed for consistency with the cable television regulations we have established. The fact that an "offer" was tendered and accepted by the franchising authority rather than demanded by that authority makes no practical difference in the administering of our rules. We look at all provisions, particularly for extra services or equipment, that are enforceable against the franchisee regardless of how they originated.

[9] Comments filed pursuant to this *Notice of Proposed Rule Making and Inquiry* should be referred to Docket No. 20019.

56. We do not mean to imply that any of the particular suggestions mentioned above are necessary to comply with our present requirements. They are simply illustrations of some successful approaches to the problem. In essence we anticipate for now that the franchising process includes open access to the decision-making process both for citizens and applicants, fairness to all parties, and consistency in the administration of any rules adopted to grant the franchise.

57. Many parties have asked whether we intended our current rules on public proceedings to include franchise renewal proceedings. The simple answer is yes. We have made no specific requirements either in the initial grant procedures or in renewal procedures. We do not require that there be written bids or even that there must be competitive procedures. In some cases, negotiated bids with selected applicants may be appropriate. These are matters for the franchising authority to decide. Particularly in renewals, which we will discuss more fully later, there may be no reason for competitive bidding. In both initial and renewal proceedings, however, we do require open access, consistency, and overall fairness. We may add new requirements as a result of the inquiry we have just initiated in this area but these minimums, we are confident, will not change.

Construction—Line Extension

58. In both Sections 76.31(a)(1) and (2), we refer to the ". . . adequacy and feasibility of . . . construction arrangements" and that the cable operator must ". . . equitably and reasonably extend energized trunk cable . . .". Confusion arising from these requirements prompts further clarification.

59. It was our intent that all parts of a franchise area that could reasonably be wired would be wired. The initial problem we were trying to cope with was the "hole in the donut" situation that could have developed in larger markets, that is, the wiring of the more affluent outlying areas of a city while ignoring the center city or the wiring of the "desirable" section of town and not providing the communications benefits of cable to the poorer areas. It now develops that in most instances this is not as much of a problem as was feared. In fact, the problem is reversed. The high density areas are being wired but the outlying, less populated suburbs are not.

60. Clearly, this problem can best be dealt with at the local level since every community presents unique demographic vagaries. Some over-all guidelines, however, should be set out. Obviously, the ideal case is where a franchisee is required to wire the entire franchise area. This is our present rule. The purpose of the rule was to assure that no "cream-skimming", wiring just the economically lucrative portions of a franchise area, would take place. We are aware, however, that many franchises are being granted that do not encompass the entire political subdivision of the grantor. Such grants are appropriate so long as they are not used as a device to deprive certain portions of the population of service. In some cases, cities decide to grant multiple franchises to different franchisees for various discrete sections of the franchise area. This is acceptable so long as the ultimate result is complete coverage of the area. Clearly, if the area was subdivided in such a way that one

area would be highly lucrative while another was marginal and not sought after, the result would be "cream-skimming". This would be unacceptable. Other jurisdictions define the franchise area by way of a so-called "line extension" clause, that is where the cable operator is only required to wire those parts of the political subdivision that contain a specified number of homes per mile measured on some stated formula or base. The numbers we have seen range generally from 30 to 60 homes per mile. In some cases, we acknowledge such a formula is justified. The potential subscribership in a particular community may be marginal in terms of system viability, and the extension of lines to citizens in outlying areas or pockets might spell the difference between success and failure of the system. In other cases, however, systems have apparently sought to maximize profits by only serving densely populated areas even though an averaging of the density figures to include those miles of cable plant in the sparsely populated areas indicated that the system would still be viable.

61. A middle course has been adopted in some instances whereby a formula is established in the franchise so that if outlying pockets of viewers wish the cable extended to them they must pay the specified costs involved in extending the trunk line.

62. We can see reasonable justifications in all of these approaches. They point up the necessity of local involvement in the cable process to deal with the unique problems presented by various communities. We think it would be a mistake to attempt to specify a nationwide rule on this point. Indeed, it might be very difficult to create any such rule even on a state by state level. This is a job for the localities.

63. Because we recognize this problem, we have and will continue to grant certificates of compliance to applicants whose franchises do not require our ideal, the wiring of the entire community. However, before we do, we want assurances in the application and from the franchisor that the public, and particularly those citizens directly affected by the exclusions or conditional wiring provisions, are informed of the effect of such provisions before they are adopted. In at least some cases such notification has been accomplished by local newspaper articles including maps indicating the specifically affected areas. In others, local officials directly contacted affected homeowners.

Unfortunately, however, in many cases line extension policies were set without any consultation with the citizens involved, and at least a few instances have been found where even the franchising authority did not fully comprehend the effect of its actions. We are not prohibiting line extension provisions in franchises, but we do intend to require that there be a showing that such provisions were developed knowledgeably and publicly. Any line extension formulas arrived at under these conditions are likely to be reasonable, having taken into consideration costs, population density and averages, terrain problems, long range land development plans, etc. under public scrutiny.

64. Since the assurances we are requesting do not presently appear in our rules, we plan to make the appropriate amendments consistent with the proposal outlined above. We invite any interested party to comment on this suggested addition to our rules. Any other proposals

submitted aimed at remedying this problem will also be considered prior to the adoption of any specific new rule or filing procedure.[10]

Countywide franchises

65. This entire discussion of franchise area delineation takes on even more immediate importance in the many unincorporated, county-regulated areas of the country. Clearly a large county with many non-contiguous population pockets does not expect one franchisee to wire the entire county, particularly at the rate of construction we have recommended. For this reason, we have consistently contacted applicants for certificates of compliance with blanket county franchises and requested more specific information on what areas the system plans to serve. Certificates of compliance will only be granted for those specified areas, not for an entire county, unless the applicant truly intends to serve the entire area within a specified construction time schedule.

66. In most instances, county franchisees are in fact developing systems for particular unincorporated communities within the county. It would be a significant help to us if county governments designated what they considered to be the discrete communities within their jurisdiction. Such delineations are, after all, uniquely a part of the responsibility of local officials. Their conclusions will have significant impact on the applicability of our rules (for example, in the area of our filing and access channel requirements which apply to each discrete community).

Extension of service

67. One of the most common complaints about cable television received by this Commission is a potential subscriber's inability to obtain service. This generally is caused by one of three situations: there is no cable television system in the locality; there is a system, but it will not extend its lines; or there is a system in an adjacent jurisdiction, and it is unable to extend beyond its franchise area.

68. In the first instance, of course, there is little that can be said other than that the community should, if there is substantial interest, seek a franchisee. The second case, refusal to extend service, relates directly to our previous discussion of line extension policies. The third problem, however, is more difficult.

69. In an increasing number of cases, we are finding that newly developed areas, housing developments and the like, find themselves unable to obtain service because they are located either at an extreme fringe or outside the franchise area. This is an unavoidable and vexing problem that can only be remedied by cooperation and planning. The FSLAC report (Issue #15) comments on this situation in detail and we think their conclusions are a helpful guideline to all regulatory authorities:

"Extensions of service, both within a given franchise area and into adjacent areas, have and will continue to be made voluntarily by operators in response to economic and public relations forces. Jurisdiction for mandatory (involuntary) extensions may be applied only to new franchises and renewals."

[10] Comments filed pursuant to this *Notice of Proposed Rule Making* should be referred to Docket No. 20020.

Discussion: The subject of mandating extensions either within the franchise area or to contiguous areas prompted considerable debate within the Committee.

Relating to extension of existing systems, the Committee opposes forced extensions into areas not specifically contemplated or required by the existing franchise. The Committee believes that in most cases an operator's failure to make an apparently feasible extension (i.e., to respond voluntarily to normal market forces) is evidence of economic and engineering problems faced in effecting extensions which were not contemplated when the system was originally designed. In this area there also appear to be valid legal concerns about modifications of existing contracts.

The Committee holds a different view in the case of new franchises where the franchisee has of his own free will accepted line extension requirements as an initial condition of doing business. In such cases we urge both the franchisee and the franchising authority to seriously think and plan the area's development pattern over the term of the franchise so that future engineering problems can be avoided. It would seem appropriate, and consistent with our views relating to the definitions of the franchise area for the franchising authority and franchisee to agree upon an expandable definition of the required service area including a clear statement of the condition under which extensions could be mandated.

For these purposes renewals can be viewed as new franchises, assuming . . . that a non-renewed operator who has faithfully performed his expired franchise is assured of realizing fair value for his property. Subject to this condition, as in the case of a new franchise, whatever requirements are imposed would be the result of an arms-length agreement.

Finally this position on renewals would tolerate the imposition of extension requirements on existing franchisees in the extraordinary cases where, by state action establishing an overriding public interest in receipt of cable service, all existing franchises were terminated and reissued." [11]

70. In this regard, particularly in areas where there are pockets of population or growing suburban subdivisions, we would urge that franchising authorities in contiguous communities join together in planning for future cable development. We have seen several cases in which a new housing development was unable to get cable service because it was on the extreme edge of its community but the adjoining jurisdiction's cable system was readily available. A "joint powers" agreement or other type of cooperative arrangement between the communities could easily solve these problems.

71. We are treating this subject in considerable detail because we consider it one of the most important factors in local and regional franchising. Service extension and the delineation of the franchise should be one of the primary concerns of local regulatory authorities. It has received too little attention in the past.

Franchise length

72. Our rules limit the length of a new franchise to a maximum of 15 years (Section 76.31(a)(3)). This rule was prompted by the initial trend in franchising that led to extremely long (i.e., 99-year) franchises which afforded local authorities no opportunity to review and modify the franchise agreement if necessary. Lengthy franchise grants, we noted in our 1972 report, ". . . are an invitation to obsolescence in light of the momentum of cable technology" (par. 182). We also stated, in the *Reconsideration of Cable Television Report and*

[11] See also Minority Comment, FSLAC Report Appendix A, which argues that state action may be the most appropriate or effective method of establishing nonconfiscatory required service extensions.

Order, Para. 111, that there might be some instances where longer franchises are warranted and that we would entertain waiver requests in those cases. The FSLAC report recommends that this rule be changed in favor of a more flexible approach. They argue that, particularly in the larger cities, 15 years may not be sufficient time to develop and make profitable the advanced and complex broadband communications systems being contemplated. The Committee Report states:

> ". . . It is our feeling that a fifteen year maximum period does not sufficiently deal with the difficulties of financing modern systems in cities of widely varying size. Accordingly we recommend that the maximum franchise period be redefined as a range of fifteen to twenty-five years, with specific periods within that range to be determined by individual franchising authorities. As an integral part of this recommendation provision should be made by the franchising authority for review at least every five years, commencing at most ten years after the franchise grant.
>
> The central purpose of such reviews would be to consider such issues as system performance, design modifications, and the possible need for changes in franchise terms. Such reviews might result in alterations in the basic franchise, franchise extensions, and other possible changes in the agreements between the parties. In no case would such review periods preclude proceedings by the franchising authority at any time for termination of the franchise for cause."

73. The problem of minimum franchise terms has also been raised. In some cases, certificates of compliance are being sought for franchises with a one-year term. We question the advisability of this short a franchise duration. The capital costs and commitments involved in building a cable television system would seem to dictate against entrepreneurs accepting such short terms. We understand that in some states a year-to-year franchise is easier to secure than a term franchise necessitating a public referendum. However, such year-to-year franchises impose significant risks and increased administrative burdens. We intend to consider a rule imposing some minimum franchise term, possibly between 5 and 7 years, to remedy this problem.

74. We invite any interested party to submit comments on both the proposal made in the FSLAC report and our suggestion for a minimum term requirement as well as any other suggestions for modifications of our rules on franchise duration. Of particular interest would be any cash flow figures supporting contentions for the need for longer franchise terms.[12]

Franchise modification and renewal

75. The entire subject of franchise duration, modification, renewal, expiration, and cancellation is one that is fraught with difficulties. First, a few points should be made to clarify our own filing requirements in this area. While we are considering proposals to change the duration rules (§ 76.31(a)(3)), the existing 15-year maximum will remain in effect. This maximum applies to both the initial grant and any renewals. A franchise calling for a 15-year term with a renewal option at the sole discretion of the franchisee does not comply with the rule. The franchisor must at least review, in a public proceeding, the performance of the system operator and the adequacy of the franchise as well as its consistency with our rules prior to renewal. This is not

[12] Comments filed pursuant to this Notice of Rulemaking should be referred to Docket No. 20021.

to say that any bid procedures are required or that any new franchise offering must be made, but simply that a public review of the franchise must be held with the opportunity for citizen input prior to renewal. In this regard, it should be noted that our rules, and the certificates of compliance we grant, are based in part on the franchises included in the application. The certificate does not apply to renewal franchises or to the terms of franchises significantly amended in any way, such as a change in termination date, service obligations,[13] or franchise fees. Any such substantial change or renewal we consider to effectively terminate the existing franchise and that termination (or in effect the granting of a new franchise) requires recertification (or certification in the first instance on grandfathered franchises). An exception to this doctrine is a change in subscriber rates. Such a change is consistent with our rules so long as it is done in a public meeting and will not be considered to have terminated the existing, certified franchise.[14]

76. The reason we are taking this approach to substantial changes in franchises should be obvious. Our entire program of certification would be meaningless if significant alterations, potentially contrary to our rules, could be made in a franchise after we had certified that it complied with federal regulations. Any substantial change in a franchise, of course, would automatically end any "grandfathering" rights regarding other provisions in the same franchise. Our "grandfather" of pre-March 31, 1972 franchises was meant to give franchising authorities a reasonable amount of time in which to bring their franchises into compliance. If they are now changing provisions in the franchises, they also have had ample opportunity to acquaint themselves with the new rules and will be expected to comply with all of our franchise requirements. In dealing with previously certified applicants, we will assume that they are operating pursuant to the already certified franchise during the certificating process for the new franchise.

Franchise expiration and cancellation

77. In *Reconsideration* we expressed concern over situations where franchise renewal applicants threaten to terminate service to the public rather than reach an accord with the franchising authority. Once again, the comments in the FSLAC Report (Issue #10) are helpful by way of clarification:

> . . . [T]wo . . . problems in this area . . . bear mentioning. First, as the franchise term draws to a close with no assured renewal or fair compensation in sight, the cable operator acquires a strong disincentive to invest in needed new equipment that he cannot be certain of amortizing over the remaining term: the result, obviously, is a deterioration of service. Second, unfortunately, this situation has in the past created extreme and sometimes unwarranted pressures on franchise authorities and system operators to reach renewal agreements. Both these excessive pressures and the disincentive should be removed.

[13] The term "service obligation" or "service package" as used herein includes generally all requirements imposed on the franchisee relating to local origination or access programming, equipment, personnel, or any other purported obligations relating to programming or any other special benefits required for specified programmers or subscribers.

[14] We, of course, are primarily concerned with changes that have some relationship to our rules. We are not including in this interpretation of when recertification is required changes in such areas as indemnity or bonding requirements, specific construction or safety alterations, reporting and enforcement procedures and the like. We recognize that the franchise is a "living" document and changes must be made from time to time to reflect current situations and practices.

First, the Committee feels there should be no cancellation or expiration of the franchise without fair procedures and fair compensation. The existing franchisee should be given adequate notice and opportunity to be heard. Furthermore, we suggest that if the decision is adverse to the existing franchisee, the franchisor should have some provisions for an assignable obligation to acquire the system at a predetermined compensation formula. In the case of non-renewal this formula should call for payment of fair market value of the system as a going concern; whereas in the case of cancellation of the franchise for material breach of its terms, the compensation criterion might call for depreciated original cost with no value assigned to the franchise. In either case, the Committee would suggest that there be provision for impartial arbitration if the negotiators fail to agree on a price. The franchisor's obligation should be fully assignable to a successor franchisee selected by the franchisor.

It is also advisable, we believe, that there be a requirement that, during the reasonable interim period while transfer of the system is being arranged, the original franchisee be required to continue service to the public as a trustee for his successor in interest, subject to an accounting for net earnings or losses during the interim period.

All of these provisions should be included in the franchise itself so that the parties to the franchise know their respective rights and obligations and can plan their operations accordingly.

78. We think the Committee's advice is well taken. All the provisions mentioned are of utmost importance to the orderly process of renewal or transfer of system control. The public is directly and potentially severely affected if these provisions, or ones like them, are not contained in the franchise. We strongly suggest that all franchising authorities include such provisions.

79. Our concern in this area is so great, particularly as to guaranteed continuation of service to the public, that we are considering adopting rules requiring franchises to contain specific provisions and procedures relating to expiration, cancellation, and continuation of service. We invite all interested parties to comment on this proposal.[15] Particular attention in the comments should be given to whether the rule should be a general one, simply requiring that franchises contain such provisions or whether the rules should be more specific as to the type of safeguards we should require to protect the public interest in this area. We would reiterate, however, that regardless of the outcome of this proceeding, franchising authorities would be wise to adopt the type of provisions discussed above. Too many instances have already come to our attention of threats to cut off service to the public.

Transfers

80. In a related notice of rule making and inquiry, we would like to explore the difficult problem of transfers or assignments of control of franchises.[16] At the moment we have no firm rules in this area and many questions have arisen. We note, for instance, that most new franchises require prior local approval before a transfer can take place. We assume that such approvals are given only after full public proceedings. We do not, however, require the inclusion of such provisions in the franchise at this time. Comments are invited on whether such requirements should be added to Section 76.31 of our Rules.

[15] Comments filed pursuant to this Notice of Proposed Rule Making should be referred to Docket No. 20022.

[16] Comments filed pursuant to this Notice of Proposed Rule Making and Inquiry should be referred to Docket No. 20023.

81. Unfortunately, this is not as simple as it may appear. What, for instance, constitutes a transfer of control? If corporate ownership changes by acquisition, merger, etc., yet the local franchisee remains the same, should this trigger a public proceeding with all that entails? What effect would such an interpretation have on the ability of multiple system operators to consolidate, merge, etc., in the open market place? Should franchising authorities even be concerned with this type of "transfer" so long as the negotiated terms of their franchise are enforceable? Clearly it is time for us to inquire into these areas and adopt appropriate regulations to deal with them where necessary.

82. A question has been raised as to whether franchise transfers constitute a "significant change" so as to require recertification. At the moment, they do not. It would seem that so long as the franchise terms comply with our rules and the franchise is so certified, it is unnecessary for us to require recertification of the same document. The selection of the franchise holder is, after all, a local matter under our rules.

83. While we do not consider recertification necessary because the terms of operation in a simple transfer or assignment remain the same, we are considering adding a provision to our filing requirements for the submission of a new Form 325 for any transferred system. Such a rule would assure us that our files are always updated on transfers of ownership as soon as they occur. When we receive this information, it would be checked for compliance with our cross-ownership rules. A statement of such compliance accompanying the submission might also be required. Comments on this proposal or any other recommendations on dealing with the complex problems involved with transfers of control as well as franchise expiration, cancellation, and termination are invited. The discussion of these problems above should put all parties on notice that we consider this a particularly difficult area that requires careful study and perhaps additional regulation.

Subscriber rate regulation

84. In Section 76.31(a)(4) we require that cable systems, in order to receive a certificate of compliance, must have a franchise providing for franchisor approval of initial charges for installation and regular subscriber service. We have intentionally and specifically limited rate regulation responsibilities to the area of regular subscriber service, and we will continue to do so. We have defined "regular subscriber service" as that service regularly provided to all subscribers. This would include all broadcast signal carriage and all our required access channels including origination programming. It does not include specialized programming for which a per-program or per-channel charge is made. The purpose of this rule was to clearly focus the regulatory responsibility for regular subscriber rates. It was not meant to promote rate regulation of any other kind.

85. After considerable study of the emerging cable industry and its prospects for introducing new and innovative communications services, we have concluded that, at this time, there should be no regulation of rates for such services at all by any governmental level. Attempting to impose rate regulation on specialized services that have not yet

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developed would not only be premature but would in all likelihood have a chilling effect on the anticipated development. This is precisely what we are trying to avoid. The same logic applies to all other areas of rate regulation in cable, i.e., advertising, pay services, digital services, alarm systems, two way experiments, etc. No one has any firm idea of how any of these services will develop or how much they will cost. Hence, for now we are pre-empting the field and have decided not to impose restrictive regulations. Of course, at such time as clear trends develop and if we find that the free market place does not adequately protect the public interest, we will act, but not until then.

Subscriber complaints

86. Assuring that subscribers receive quality service and quick resolution of any complaints is one of the most important regulatory functions to be performed at all levels of government. The primary locus of responsibility, however, must be at the local level, where the service is. For this reason we stated in Section 76.31(a)(5) that specific procedures for the resolution of subscriber complaints shall be included in the franchise and that there shall be a local business office or agent available to subscribers to remedy complaints. Many franchises are now being reviewed which have full statements of the franchisee's obligations to resolve subscriber complaints but no indication whether the franchisor has any responsibilities. We wish to make it clear, therefore, that this obligation was meant to cover both parties.

87. If no specific franchise statement indicates with whom or where to register complaints at the local level and what will be done with them once received, the public is not well served. The result of this information gap to subscribers is that local complaints often are sent to this Commission.[17] We, in turn, inform the correspondent that his complaint is within the purview of local not federal officials, and he should contact them. Much time and effort is thus wasted.

88. In order to fully comply with Section 76.31(a)(5), therefore, we expect that franchising authorities from this point on will include specific provisions in the franchise on what government official will be directly responsible for receiving and acting upon subscriber complaints.[18] We would also urge that this information along with the specified procedure for reporting trouble to the cable operator be given to all subscribers as they are hooked into the system. Some communities have required that a card with this information on it be given to each new subscriber. It seems to have worked well, and we would encourage adoption of this approach.

89. Some questions have been raised regarding the meaning of our requirement for a "local" business office. In most cases, this is a clear requirement. A system serving one city should have a business office or other means in that community to receive and act on subscriber complaints. However, we will be flexible in the interpretation of this

[17] This Commission has established a subscriber complaint service to aid the public. Its efforts are primarily aimed at clearing up misunderstandings between subscribers and systems with regard to our rules and the informal resolution of complaints.

[18] We propose changing our rules to make this requirement clear. Any interested party may file comments on this *Notice of Proposed Rule Making*. Comments on this subject should be referred to Docket No. 20024.

rule as it relates to a single head-end multi-community system or a "county" system. The operator of a single-plant multi-community system need not have a business office in each of the communities served so long as subscribers can call a local telephone number to register complaints and personnel are available to act on those complaints. On the other hand, we will not accept a situation where there is only one business office in a large county necessitating long-distance telephone calls for some subscribers to register their complaints.

Franchise consistency

90. As we have said throughout the period of developing these rules for cable television, the process is evolutionary. We expect to continue to modify, clarify, add, or eliminate provisions as the need arises. We intend to remain flexible in this regard and franchising authorities should be on notice that this is the case. For this reason, we included the requirement in Section 76.31(a)(6) that a franchise should specifically contain provisions allowing for amendments to comply with our rules. Unfortunately, although this rule appears to be clear on its face, many franchises have not included such a provision. It should be understood that any required modifications would have to be made even where a franchise does not specifically state that it is amendable to comply with our changes within one year. However, we would prefer a clear statement in the franchise to that effect to make sure all parties are aware of the possible need for modifications.

Franchise fees

91. In Section 76.31(b) a limitation is imposed on the franchise fee deemed acceptable in an application for a certificate of compliance. Many questions have been raised about the perimeters of this limitation (see, e.g., FSLAC final report (Appendix B) "Memorandum Regarding Clarification of Section 76.31(b) and Related Matters" and the associated minority opinion).

92. The purpose of the limitation we imposed was clearly stated in the Cable Television Report and Order:

> . . . We are seeking to strike a balance that permits the achievement of federal goals and at the same time allows adequate revenues to defray the costs of local regulation.

We have found no reason to change our position on this matter. The use of the franchise fee mechanism as a revenue raising device frustrates our efforts at developing a nationwide broadband communications grid. Excessive fees or other demands in effect create an obstruction to interstate commerce which must be avoided.

93. The figure of three percent of gross subscriber revenues seems to more than adequately compensate the average franchising authority for actual regulatory costs. We have provided a waiver mechanism for fees up to five percent of gross subscriber revenues in those cases where an unusual or experimental regulatory program is proposed that can be shown to need the extra revenue.

94. Because of the many questions raised regarding this rule we will review the reasoning, intent, and scope of Section 76.31(b) as it relates to the rest of our rules. First, some definitions appear necessary.

"*Gross subscriber revenues*"

95. The term "gross subscriber revenues" is meant to include only those revenues derived from the supplying of regular subscriber service, that is, the installation fees, disconnect and reconnect fees, and fees for regular cable benefits including the transmission of broadcast signals and access and origination channels if any. It does not include revenues derived from per-program or per-channel charges, leased channel revenues, advertising revenues, or any other income derived from the system.

Fees from auxiliary services

96. We recognize that the income derived from auxiliary cable services may at some future time constitute the bulk of a cable system's receipts. We have no intention of depriving the franchising authority of a reasonable percentage of those receipts at that time. But for now, the monies derived from ancillary services are best used to support the development of those experimental and largely unprofitable services. We encourage experimentation in ancillary services. Any funds that can be freed to support those services will ultimately benefit the community of the system and aid our efforts at seeing these services develop nationwide.

97. Because we are presently imposing a "gross subscriber revenues" limit on franchise fees which may, at some future date, be lifted, we suggest that franchising authorities write their franchise fee provision flexibly, that is, using a "gross subscriber revenues" base for now but including a provision for the base to change to "gross revenues" automatically in the event that this Commission changes its rules.

98. There have been several cases where a franchise fee was based on something other than gross subscriber revenues. Generally, such instances arise when the fee is based on a specific monetary figure per year per subscriber. In those cases, the percentage is figured based on the subscribed rate and an average penetration estimate. Regardless of how the fee is stated, however, we will attempt to translate the fee into a percentage of gross subscriber revenues to see if it reasonably complies with our rules.

State and local fees

99. It should be noted that we include all non-federal regulatory fees in our limitation. The purposes stated in the *Report and Order* would clearly be circumvented if we interpreted the rule otherwise. Our concern that ". . . high local regulatory fees may burden cable television to the extent that it will be unable to carry out its part in our national communications policy . . ." (Para. 185) is just as valid if the burdensome fees are imposed by a combination of local authorities. Accordingly, both local franchise fees and state fees, if any, will be added together to determine compliance with our fee limitations.

100. Another related problem has recently been brought to our attention in this area of fees. Several jurisdictions are now attempting to impose a "use tax" as well as a fee for cable television service. It would appear that such a tax, particularly when its purpose is described as general revenue raising, results in the same potential harm we are

attempting to avoid by imposing a franchise fee limitation. While the particular cases before us (CSR–479, Stockton, Cal., and CSR–499, State of Florida) will be dealt with in separate actions, we think it is necessary to express our concern about this development. The burdens and obstructions to the growth of a viable nationwide communications grid remain the same whether imposed via a fee or a tax mechanism.

Franchise fee waivers

101. As we noted earlier and made clear in the *Report and Order*, waiver of the three percent ceiling is available. Indeed, even our rules indicate that up to five percent could be considered a reasonable fee depending on specific showings. Many have asked what exactly need be shown to allow a fee between three and five percent.

102. While each case, of necessity, is different and must be handled on an individual basis, some general guidelines can be given. The bulk of the regulatory burden at the local level comes in the first few years of cable development. The creation of a cable ordinance and the granting of a franchise as well as supervision of construction all occur in this period. Aside from normal franchise enforcement and review, very little actual regulation on a day-to-day basis goes on after this initial surge of activity. The number of franchises now being adopted with our fee limitation intact indicates that three percent of gross subscriber revenues does cover these costs.

103. It is the rare case where a more comprehensive regulatory program is contemplated that extra fees might be justified. Such programs are usually in the larger markets or where experimental applications of cable are being attempted. In these cases, we recognize that our three percent fee limit might not cover the costs incurred. Where it can be shown that the three percent figure will not be adequate and that the specific contemplated costs of the specific regulatory program require extra input in the form of fees up to five percent of gross subscriber revenues, we will entertain waiver requests.

104. Petitions to justify fees in excess of three percent should include both a full description of the special regulatory program contemplated and a full accounting of estimated costs. Such petitions should also contain information on the estimated subscriber penetration and the derived figures on revenue anticipated from the franchise fee. It is only with a complete showing of this nature that we can realistically determine if the extra fee request is justified and that it will not adversely affect the operator's ability to accomplish federal objectives.

105. The recitation of the normal obligations to oversee a franchisee assumed by the local authority is not sufficient to warrant extra fees. Justifications that simply allocate a portion of the time and salary of various city officials to cable regulation without a full explanation of the special regulatory program to be carried out will also not be considered sufficient. Such an allocation, without amplification, would only confirm that the fee is being used to augment the general treasury as a revenue raising device.[19]

[19] We note that the Report to the President by the Cabinet Committee on Cable Communications (1974) has adopted our view against the use of cable franchise fees for such purposes. Recommendation 9(c).

106. The reason we have allowed for extra fees despite our concern over the possible strain such fees impose on our nationwide program is to maintain flexibility. In those cases where a special office of telecommunications (such as in New York City) is warranted by unique circumstances or special personnel is hired to handle cable television regulation and complaints, the new costs could in part be covered by the higher franchise fee. Very few situations of this type have come to our attention.

Lump sum payments

107. Included in our fee limitation is a notation on lump sum payments or payments-in-kind. It is important that everyone understand the ramifications of this notation. Were we to allow a large initial lump sum payment for securing the franchise it would negate the effort we have made to limit the franchise fee. Bidding contests would continue unabated. The public would be the ultimate loser since the franchising authorities and bidders would focus on bidding rather than how and by whom the best service can be provided to the community. We therefore include any lump sum payments in our injunction on the ultimate size and effect of the fee. Such payments are amortized over the term of the franchise to determine their effect on the percentage figure. One exception to this method is stated consulting fees and expenses incurred in the granting or renewal of the franchise. If these fees are not excessive and can be shown as direct costs to the franchising authority, we think they should be recoverable from the ultimate franchisee or from all franchise applicants as has been done in some cases. It is not unusual for the franchising authority to spend several thousand dollars for an independent survey or consultant to aid in developing the cable ordinance. So long as these expenses do not become a new form of bidding we will not include them in our calculation of franchise fees. A specific showing of the expenses, however, should be made. Ideally, the expenses should be calculated and set prior to franchise bidding and the established costs either allocated among the bidders or applicable to any franchisee. Of course, we will continue to watch such charges for any evidence of abuse.

Extra service package requirements

108. Another area that we closely monitor in relation to the franchise fee is the rather all-encompassing problem of "extra services". This has included everything from the free wiring of entire school systems to the building of television studios attached to the local high school, extra free channels, fees for access groups, and even free television sets for city officials. This is a very difficult problem to deal with, as can be seen from the Federal/State-Local Advisory Committee's rather lengthy discussion of the topic, *supra*. It is precisely because these "extra services" take such diverse forms that specific guidelines are almost impossible to enunciate. We will attempt to discuss some of the more commonly requested extra services and their relationship to our overall policy. In that way we would hope that franchisors and applicants can be more sensitive and responsive to the problems we see developing.

109. In many if not most franchises, the franchisee is required to install one free "tap" or "drop" in each local school and often in every other government building (city hall, firehouse, etc.). We have no objection to such a provision. In a few instances, however, the free extra service has been much greater. Some franchises have required the cable operator, for instance, to wire each room in all the local public schools. This in essence requires the operator to internally wire the school system free of charge. Such an expense can be considerable, especially when several hundred rooms might be involved. The cost of equipment and materials alone could amount to more than the revenue derived from the franchise fee. It is this sort of indirect "payment-in-kind" that we are watching very closely and will not allow without justification. This type of expense is just as real and has just as much of an effect on the franchisee as a simple fee. All parties must begin to recognize that when such costs are incurred they of necessity often become trade-offs on service provided elsewhere to the community at large. In this example we merely have the cable operator subsidizing the school system. That is not his function.

110. A trend seems to be developing where franchising authorities specify in the franchise the production equipment to be made available. Some franchises have become so technical that they even include the model numbers of particular microphones and cables. While such "service package" requirements are not prohibited by our rules, we do not think it is a particularly good idea. Technology in the area of low-cost video production equipment is advancing so rapidly that such specifications are likely to be an invitation to planned obsolescence. We only repeat, in this regard, that origination and access will not work because of anything written in a franchise. It is far more important for the franchising authority to assure itself of the character, responsiveness, and interest of the potential operator than it is to write strict franchise provisions in this area. The mere requiring of specific cameras and equipment will not guarantee successful community access. Real commitment and interest cannot be required in any legal document.

111. As was noted earlier, if the franchising authority wishes to specify the service package it expects from the operator in the franchise, we will not stop it from doing so. Reasonable service offerings can and are being made in the franchising process. Both franchising authorities and franchise applicants must recognize, however, that any specification of services will reflect on the costs of the over-all service to the community. Excessive service demands or offers will affect the viability of the system. Cable operators must learn that accepting such demands simply to secure a franchise may not be in their or the cities' best interest. Similarly, franchise authorities must be cautious in accepting high priced extra service offerings on the basis of bid procedures. The net effect of some superficially attractive offerings might be a basic system that does not find it possible economically to serve the community properly.

112. It has been our policy to date to view any service package requirements in relation to our franchise fee limitation. We plan to relax this approach experimentally. The service package—so long as it is directly related to services and equipment which can potentially

benefit all cable users—will now be treated as a contractual question and, so long as the package is not clearly excessive, solely up to the discretion of the franchisor and franchisee.[20] We wish to emphasize, however, that we are relaxing the effect of our rules experimentally. Any evidence that cable operators or franchisors are using this relaxation to return to the damaging process of simple "bidding contests" will result in the immediate reinstitution of our former procedures.

113. It should be noted that we are making a distinction on what will or will not be viewed as part of the franchise fee "payment-in-kind" limitation. Required extra services that benefit only one group of special users is still considered a type of cross-subsidy that will be viewed in relation to the franchise fee. As an example, the operator being required to wire the entire local school system for closed circuit cable use would still be considered payment-in-kind. Specific equipment or personnel requirements where the benefits are available to all cable users would not.

114. Our purpose, in part, in imposing a franchise fee or payment-in-kind limitation was to prevent the siphoning of the limited available capital for cable development for other uses, thereby threatening the success of our overall national goals. We intend to maintain that limitation. Reasonable service requirements that directly benefit cable development and use by all parties is compatible with that purpose.

115. Another reason for this adjustment in our review policy is that the complexities involved in any service package offering and the innumerable variations result in an ad hoc administrative process that cannot be effectively carried out with any consistency. We are, however, sensitive to our obligation to insure that abuses do not arise that will threaten our nationwide program. For this reason, we expect to issue a Notice of Proposed Rulemaking in the near future that will suggest revisions in our filing and reporting procedures so that we can get more specific data on the costs of special service packages.

116. The information we will be seeking is also information that any responsible franchising authority should demand prior to accepting any applicant's proposal, i.e., what are the expected expenses involved in the service offering; how will those expenses contribute to the quality of cable services in the community; what will be the effect of those expenses on the financial viability of the system, etc.

117. We will no longer attempt to "second guess" the franchising authority on the answers to those types of questions. It is hoped that all parties will realize that decisions made in the area of required services may well have a major impact on the development of cable in any particular locale. We will, however, continue to monitor such agreements. If we find that serious abuses are arising that could effect our national goals we stand ready to re-establish procedures to remedy the problem.

118. Once again, it should be emphasized that the flexibility we are encouraging in service packages is restricted to services, equipment or personnel available to all cable users. Proposals that would benefit only

[20] In this context we are discussing "service packages" only as they relate to equipment, personnel, etc. This does not include pre-empted services such as extra channels, origination programming, etc.

one class of cable users would not be acceptable. Studies, equipment, or mobile vans designated for use or given specifically to one group such as the educational authority or a public access group would not be reasonable. Such equipment, etc., must inure to the benefit of all users, including the cable operator, for his own origination programming, if any. As was explained in detail earlier in this document, guidelines and procedures for waivers will remain in force regarding channel capacity, extra access channel demands, etc.

Use of fees for other purposes

119. In yet another area where the franchise fee limitation has come into question, we have received many inquiries regarding the use of the fee for purposes other than to defray regulatory costs. Proposals have been made, for instance, to use a portion of the franchise fee to pay for access programming or to aid local educational broadcast facilities. As a general rule we have stated that the franchise fee should be based on regulatory costs. It should not be used for revenue raising purposes. We continue to hold this position at this time.

120. As with most of our other regulations in this field, we intend to maintain flexibility. We will entertain waiver requests for the use of franchise fees of non-regulatory purposes. Such requests, however, must be very specific. Information on how the funds will be used, distributed, and accounted for must be included. A showing that the proposed use of the fee is consistent with our regulatory program and will benefit the development of a broadband communications system will also be necessary. In carefully reviewed cases where a specific experimental program designed for a particular community is presented we will consider granting waivers of our rules. Generally speaking the use of these "extra" fees will be limited to the same maximum now imposed for regulatory purposes, five percent of gross subscriber revenues. In most cases that have come to our attention the special uses fees are limited to the two percent "pad" between three and five percent. It is unlikely that we will allow waivers for any proposal that exceeds a total of five percent for regulatory and non-regulatory purposes.

121. Proposals to use the two percent "pad" in the franchise fee rules for public access purposes pose several significant problems for us. While we recognize the need for additional funding for access, there are serious difficulties, we feel, with governmental funding of programming. These difficulties exist regardless of the mechanism for distribution. We intend to issue a separate document shortly that will address this specific issue.

Conclusion

122. In summation, on the question of franchise fees and extra services or other obligations, we intend to be vigilant and monitor any such requirements thoroughly to assure that no undue burdens are being imposed that would result in a diminution of the overall goals we have set for cable television. Reasonability is the keynote to any such program, and we will remain flexible and open to any thoroughly considered proposals. Our rules and the service requirements we impose on cable operators are intended to provide a solid base for the de-

velopment of a nationwide means of broadband communications. In most instances, no more is required or, indeed, desirable at this time. It is unreasonable to expect an infant industry to be able to start where we all hope it will eventually end—as a truly new and innovative highly complex broadband network. It must be allowed to grow in stages or it will be killed by overexpectation and excessive demands.

123. The clarifications and guidance we have provided in this document will hopefully aid all parties in our effort to develop responsive and flexible regulations for an emerging industry. The announcement of several new rule making inquiries herein is yet another testimonial to the fact that we intend to continue to investigate, clarify, modify or change our regulations as the situation warrants. The regulatory concepts we have adopted are new and many of our rules are experimental. We welcome any supported recommendations aimed at improving them.

124. Authority for the rule makings proposed herein is contained in Sections 4(i), 303, and 403 of the Communications Act of 1934, as amended. All interested parties are invited to file written comments on these rule making proposals on or before June 7, 1974 and reply comments on or before June 21, 1974. Please note that separate docket numbers have been assigned to individual rulemaking inquiries initiated herein. Comments should also be filed separately. In reaching a decision on these matters, the Commission may taken into account any other relevant information before it, in addition to the comments invited by this Notice.

125. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, an original and 14 copies of all comments, replies, pleadings, briefs, or other documents filed in this proceeding, shall be furnished to the Commission. Responses will be available for public inspection during regular business hours in the Commission Public Reference Room at its Headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74–337

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
INQUIRY INTO DEVELOPING PATTERNS OF OWNERSHIP IN THE CABLE TELEVISION INDUSTRY	Docket No. 17371 7 FCC 2d 853 (1967)
AMENDMENT OF SECTION 74.1107 OF THE COMMISSION'S RULES REGARDING CARRIAGE OF TELEVISION SIGNALS ON CABLE TELEVISION SYSTEMS	Docket No. 17438 FCC 67–576
INQUIRY INTO OPERATION AND EFFECT OF PRESENT COMMISSION POLICIES REGARDING CARRIAGE AND PROGRAM EXCLUSIVITY ON CABLE TELEVISION SYSTEMS	Docket No. 17505 9 FCC 2d 984 (1967)
AMENDMENT OF SECTION 74.1103(g)(2) OF THE COMMISSION'S RULES REGARDING SYNDICATED PROGRAMING PROTECTION	Docket No. 19320 31 FCC 2d 844 (1971)

ORDER

(Proceedings Terminated)

(Adopted April 3, 1974; Released April 8, 1974)

BY THE COMMISSION:

1. On February 2, 1972, the Commission adopted amendments to Parts 1, 15, 21, 74, and 91 of the Commission's Rules and Regulations and further adopted new Parts 76 (Cable Television Service) and 78 (Cable Television Relay Service) of the Commission's Rules and Regulations.

2. The above captioned proceedings were instituted to assist the Commission in its determination of the appropriate regulatory scheme regarding cable television. The adoption of the Rules and Regulations set forth in 1. above has rendered these proceedings moot.

Accordingly, IT IS ORDERED, That the proceedings in Docket Nos. 17371, 17438, 17505, and 19320 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-320

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of APPLICATION FOR EXEMPTION FROM THE RADIOTELEGRAPH AND RADIO DIRECTION-FINDING APPARATUS PROVISIONS OF THE SAFETY OF LIFE AT SEA CONVENTION, LONDON, 1960, FOR THE U.S. PASSENGER VESSEL *Columbia*, WHILE NAVIGATED ON INTERNATIONAL VOYAGES SOLELY ON INLAND VOYAGES	File No. X-1180

MEMORANDUM OPINION AND ORDER

(Adopted April 2, 1974; Released April 8, 1974)

BY THE COMMISSION:

1. The Commission has received an application from the State of Alaska, Division of Communications for exemption from the radiotelegraph and radio direction-finding apparatus provisions of the Safety of Life at Sea Convention, London, 1960, for the United States passenger vessel COLUMBIA, 3500 (estimated) gross tons.

2. The applicant makes the following statement in support of his request:

a. the vessel will be navigated on international voyages (1) between Skagway, Alaska and Prince Rupert, British Columbia, with stops at Haines, Juneau, Sitka, Petersburg and Wrangell and (2) between Ketchikan, Alaska and Seattle, Washington via Prince Rupert, B.C. and the Inside Passage;

b. the vessel will always be within inland waters, never more than six nautical miles from the nearest land;

c. the vessel will carry a crew of 50 and 546 passengers;

d. the State of Alaska operates three other passenger ferry vessels over these identical routes and experience has shown excellent radiotelephone communications over the entire route; and

e. the radar installed is adequate for navigation in the narrow passages encountered on these voyages.

3. When the vessel is navigated on the above described international voyages, it is subject to the provisions of the Safety Convention. Previous tests conducted by the MALASPINA and experience gained with the MALASPINA, MATANUSKA and TAKU shows that the radiotelephone installations have been adequate for safety purposes. Since the COLUMBIA will be navigated for the most part in relatively narrow passages, the provision of radio direction-finding apparatus appears to be of limited value as a navigational instrument. The radar installed would appear to be of greater value for this purpose. Under the circumstances described above, it would appear to be unreasonable to require the COLUMBIA to comply with the radio-

telegraph and radio direction-finding apparatus provisions of the Safety Convention.

4. Regulation 5, Chapter IV and Regulation 12(b), Chapter V of the Safety Convention authorize the Commission to exempt passenger vessels on international voyages from the radiotelegraph and radio direction-finding apparatus provisions, respectively, of the Safety Convention if it considers the route or other conditions affecting safety are such as to render full application of these provisions unreasonable or unnecessary.

5. Accordingly, IT IS ORDERED, That the United States passenger ferry vessel *Columbia*, 3500 (estimated) gross tons, be exempt from the radiotelegraph provisions of Regulation 3, Chapter IV and the radio direction-finding apparatus provisions of Regulation 12, Chapter V of the Safety of Life at Sea Convention, London, 1960, when navigated on international voyages solely on inland waters, not more than six nautical miles from the nearest land (1) between Skagway, Alaska and Prince Rupert, British Columbia with stops at Haines, Juneau, Sitka, Petersburg and Wrangell, and (2) between Ketchikan, Alaska and Seattle, Washington via Prince Rupert, British Columbia and the Inside Passage for a period of one year beginning on the date of this Order; Provided, That:

(1) the vessel is equipped with a radiotelephone installation which fully complies with the requirements of Title III, Part II of the Communications Act of 1934, as amended, Chapter IV of the Safety of Life at Sea Convention, London, 1960, and the Commission's rules applicable to cargo vessels of 300 to 1600 gross tons;

(2) in complying with subparagraph (1), above, an additional radiotelephone transmitter shall be carried which fully meets the requirements of the first transmitter;

(3) both radiotelephone transmitters shall be connected to the reserve source of energy; and

(4) a type approved radar is installed in lieu of the radio direction-finding apparatus; and

(5) a continuous watch is maintained on 2182 kHz while the vessel is being navigated.

This exemption may be terminated by the Commission at any time, if, in the Commission's discretion, the need for such action arises.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-323

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re REQUEST FOR ISSUANCE OF A TAX CERTIFICATE FOR THE SALE OF OWNERSHIP INTEREST IN COLUMBUS CABLEVISION, INC., BY COLUMBUS BROADCASTING CO., INC., COLUMBUS, GA.	File No. CTAX-16

MEMORANDUM OPINION AND ORDER

(Adopted April 2, 1974; Released April 11, 1974)

BY THE COMMISSION:

1. On July 19, 1973, Columbus Broadcasting Company, Inc., licensee of Station WRBL-TV, Columbus, Georgia, filed a "Request for Tax Certificate" in which it asks the Commission to issue a tax certificate pursuant to Section 1071 of the Internal Revenue Code [1] with respect to the sale of its 37½ percent interest in Columbus Cablevision, Inc., operator of cable television systems at Columbus and Bibb City, Georgia. Prior to this sale, a cross-relationship existed which violated Section 76.501 of the Commission's Rules [2] because WRBL-TV places a predicted Grade A contour over the above-mentioned cable television systems. On February 7, 1974, Petitioner filed a "Supplemental Statement."

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[1] Section 1071 of the 1954 Internal Revenue Code provides:

If the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to the ownership or control of radio broadcast stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of Section 1033. . . .

The term "radio broadcast stations" refers not only to AM, FM, and television broadcast stations, but also to cable television systems and television broadcast networks, both of which provide a mass communications service ancillary to broadcasting and hence are subject to Commission regulation. *J.A.W. Inglehart,* 38 FCC 2d 541, 542 (1972); *Cosmos Cablevision Corp.,* 33 FCC 2d 293, 295 (1972).

[2] Section 76.501 of the Commission's Rules provides in relevant part:

(a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in:

(1) A national television network (such as ABC, CBS, or NBC); or

(2) A television broadcast station whose predicted Grade B contour, computed in accordance with § 73.684 of this chapter, overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers); or

(3) A television translator station licensed to the community of such system.

NOTE 1.—The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

NOTE 2.—The word "interest" as used herein includes, in the case of corporations, common officers or directors and partial (as well as total) ownership interests represented by ownership of voting stock.

NOTE 3.—In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 stockholders:

(a) Only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

2. Petitioner acquired its interest in Columbus Cablevision in 1965, prior to the adoption of Section 76.501 of the Rules; and on June 1, 1972, it sold its entire 37½ percent interest in Columbus Cablevision to Community Tele-Communications, Inc., a division of Tele-Communications, Inc., Denver, Colorado. Neither Community Tele-Communications nor its corporate parent has other media ownership interests in Columbus or Bibb City, Georgia. As consideration for this sale, Petitioner states that it received cash and 5,000 shares of Tele-Communications, Inc., common stock. Petitioner thereby obtained only about 0.1 percent of the outstanding Tele-Communications, Inc., common stock. Moreover, Petitioner represents that none of its officers or directors are Tele-Communication's officers or directors. Petitioner therefore has not retained a prohibited cross-interest in the Columbus and Bibb City, Georgia cable television systems.

In view of the foregoing, we find that Petitioner's sale of its 37½ percent interest in Columbus Cablevision, Inc., was "necessary or appropriate to effectuate a change in policy or the adoption of a new policy" by the Commission.

Accordingly, IT IS ORDERED, That the "Request for Tax Certificate" (CTAX–16) filed by Columbus Broadcasting Company, Inc., on July 19, 1973, IS GRANTED, and that the tax certificate appended hereto will BE ISSUED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

CERTIFICATE ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION PURSUANT TO SECTION 1071 OF THE 1954 INTERNAL REVENUE CODE (26 U.S.C. 1071)

Columbus Broadcasting Company, Inc., has reported to the Commission the sale, on June 1, 1972, of its 37½ percent interest in Columbus Cablevision, Inc., to Community Tele-Communications, Inc., a division of Tele-Communications, Inc., Denver, Colorado.

It is hereby certified that the transfer was necessary or appropriate to effectuate the Commission's new rules and policies prohibiting the cross-ownership, operation, control, or interest of a cable television system with a television broadcast station whose predicted Grade B contour overlaps in whole or in part the service area of such system. Section 76.501 of the Commission's Rules, adopted June 24, 1970, *Second Report and Order in Docket 18397*, 23 FCC 2d 816.

This certificate is issued pursuant to the provisions of Section 1071 of the 1954 Internal Revenue Code.

In witness whereof, I have hereunto set my hand and seal this ____ day of March, 1974.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-344

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ECONOMIC IMPLICATIONS AND INTERRELATIONSHIPS ARISING FROM POLICIES AND PRACTICES RELATING TO CUSTOMER INTERCONNECTION, JURISDICTIONAL SEPARATIONS AND RATE-STRUCTURES	Docket No. 20003

NOTICE OF INQUIRY

(Adopted April 9, 1974; Released April 10, 1974)

BY THE COMMISSION:

1. We hereby give Notice of Inquiry into the effect of current pricing practices and regulatory policies on the level and distribution of customer charges for various telecommunication services, and in particular on the extent to which various categories of customers are now or will be under alternative pricing practices and regulatory policies subsidizing the services received by others. We are particularly interested in obtaining information as to the comparative economic effects on both overall telecommunications costs and charges and on the costs and charges for different categories of both public and business customers, of such factors as the interconnection and use of customer-provided facilities, the use of specialized common carrier services in lieu of common carrier private line services, the use of flat-rate and other cost-insensitive pricing practices for local exchange services, and the jurisdictional separation of revenues and expenses for plant and facilities commonly used for both intrastate and interstate (including foreign) services. Finally, we are interested in comparative information concerning any secondary economic costs or benefits to specific categories of customers or to the public at large which result from either present or alternative pricing and regulatory policies and practices.

2. Our purpose in instituting this inquiry is to obtain information, views and comments from all interested persons that will be useful not only to this Commission in discharging its statutory obligations under the Communications Act but will also be beneficial to other agencies, including the State utility commissions, in carrying out their responsibilities. We are also of the view that the regulated carriers themselves, as well as the using public and the various elements of the nonregulated communications industry, will benefit from the information that we expect to obtain as a result of this inquiry.

3. We wish to make clear that this is primarily a fact-finding inquiry and that we are not proposing in this particular proceeding to

adopt any rules or policies, as such. However, we expect that the record developed in this inquiry will be used in part to facilitate the resolution of questions of fact, law or policy involved in certain other rule-making proceedings now pending before us as hereinafter identified. Moreover, the information and views gleaned from this inquiry may form the basis for separate regulatory actions by us or by other regulatory agencies. Furthermore, we recognize that we may find it necessary to obtain, through contract, the assistance of resources from outside the Commission and its staff for adequate research and treatment of one or more of the issues herein. Finally, we should state that, although the impetus for this inquiry is due in large part to our desire to obtain probative and meaningful evidence as to the economic effects of customer interconnection, i.e., the trend toward increased use of customer-provided terminal and other facilities in connection with the switched telephone network, our inquiry is broader in scope and extends also to the interrelated questions of the competitive supply of various specialized communications services, and alternative regulatory approaches to jurisdictional separations and rate structures, as hereinafter discussed.

DISCUSSION

General

4. In response to several recent Commission decisions [1] opening up related, specialized segments of the market for telecommunications services to competitive *vis-a-vis* traditional monopoly supply, the established carriers as well as some State regulatory authorities have raised the issue of possible adverse economic impact on other users of the basic nationwide switched telephone network. Concurrently, state regulatory authorities are urging that a larger proportion of the revenues derived from interstate services be diverted to the support of local exchange plant and facilities used in common for intrastate and interstate services. Finally, many parties including the Commission, the Bell System, and independent regulatory analysts have become aware of and concerned over the effect of usage—insensitive pricing on the requirements for any efficiency of use of plant and facilities, and correspondingly on both the overall level and distribution of charges among various user categories.

5. These several economic issues are highly interrelated, and cannot be treated consistently or comprehensively, in a manner which best serves the public interest, through separate, independent proceedings. The use of customer-provided facilities in lieu of those offered by the carriers may affect the rates for services to other customers; but the nature, extent, and public interest considerations of any such effect are highly dependent on the nature, extent and public interest considerations of any existing cross-subsidies among the different categories of customers, as a result of traditional pricing practices and cost/

[1] *Carterfone*, 13 FCC 2d 420 (1968); Denial of Petitions for Reconsideration of *Carterfone*, 14 FCC 2d 571 (1968); *MCI*, 18 FCC 2d 953 (1969); Denial of Petitions for Reconsideration of *MCI*, 21 FCC 2d 190 (1970); *Specialized Carriers*, 29 FCC 2d 870 (1971); Denial of Petitions for Reconsideration in *Specialized Carriers*, 31 FCC 2d 1106 (1971); *Domestic Satellites*, 35 FCC 2d 844 (1972).

FCC 74-344

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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2. Our purpose in instituting this inquiry is to obtain information, views and comments from all interested persons that will be useful not only to this Commission in discharging its statutory obligations under the Communications Act but will also be beneficial to other agencies, including the State utility commissions, in carrying out their responsibilities. We are also of the view that the regulated carriers themselves, as well as the using public and the various elements of the nonregulated communications industry, will benefit from the information that we expect to obtain as a result of this inquiry.

3. We wish to make clear that this is primarily a fact-finding inquiry and that we are not proposing in this particular proceeding to

adopt any rules or policies, as such. However, we expect that the record developed in this inquiry will be used in part to facilitate the resolution of questions of fact, law or policy involved in certain other rule-making proceedings now pending before us as hereinafter identified. Moreover, the information and views gleaned from this inquiry may form the basis for separate regulatory actions by us or by other regulatory agencies. Furthermore, we recognize that we may find it necessary to obtain, through contract, the assistance of resources from outside the Commission and its staff for adequate research and treatment of one or more of the issues herein. Finally, we should state that, although the impetus for this inquiry is due in large part to our desire to obtain probative and meaningful evidence as to the economic effects of customer interconnection, i.e., the trend toward increased use of customer-provided terminal and other facilities in connection with the switched telephone network, our inquiry is broader in scope and extends also to the interrelated questions of the competitive supply of various specialized communications services, and alternative regulatory approaches to jurisdictional separations and rate structures, as hereinafter discussed.

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5. These several economic issues are highly interrelated, and cannot be treated consistently or comprehensively, in a manner which best serves the public interest, through separate, independent proceedings. The use of customer-provided facilities in lieu of those offered by the carriers may affect the rates for services to other customers; but the nature, extent, and public interest considerations of any such effect are highly dependent on the nature, extent and public interest considerations of any existing cross-subsidies among the different categories of customers, as a result of traditional pricing practices and cost/

[1] *Carterfone*, 13 FCC 2d 420 (1968); Denial of Petitions for Reconsideration of *Carterfone*, 14 FCC 2d 571 (1968); *MCI*, 18 FCC 2d 953 (1969); Denial of Petitions for Reconsideration of *MCI*, 21 FCC 2d 190 (1970); *Specialized Carriers*, 29 FCC 2d 870 (1971); Denial of Petitions for Reconsideration in *Specialized Carriers*, 31 FCC 2d 1106 (1971); *Domestic Satellites*, 35 FCC 2d 844 (1972).

revenue allocations. Thus, we believe it essential, in addressing any question of economic impact or harms from specific individual regulatory or pricing policies or actions, that we gain a thorough appreciation of the economic implications and interrelationships which arise from all the major existing policies and practices. In this way, we will be able to deal fairly and realistically with the concerns not only of the various industry segments but of the public as well.

Customer interconnection

6. Following our *Carterfone* decision in 1968, petitions for reconsideration were filed which contended, *inter alia*, that we had not given adequate consideration to the economic effects from the interconnection of customer-provided communications facilities to the nationwide switched telephone network. We found, in denying these petitions, that there was at that point no evidence demonstrating any adverse economic effects from such interconnection and that we could not accept tariff conditions based on such unsubstantiated presumptions. Specifically, we found that the contentions made in that case by the carriers that the public would be adversely affected by "a loss of revenue" from existing interconnection equipment was "unsubstantiated and unsubstantial". Thus, we laid down the principle in that decision that, although economic impact was an appropriate issue to consider in evaluating the public interest aspects of customer interconnection, we expected any showing of economic impact to be supported by substantial and substantiated evidence. We agreed specifically with the contentions of the carriers that economic effects of customer interconnection on the *rate structure* of the carriers might well be a public interest question (14 FCC 2d 571, page 573 (1968)) and have instituted this inquiry, in part, to acquire the data necessary to analyze such effects.

7. In June 1972, we established a Federal-State Joint Board, in Docket 19523, to make recommendations to us on the question of whether and to what extent the carriers should be permitted or required to extend to users of the switched telephone network additional interconnection options not available under the tariffs that are currently on file with us (35 FCC 2d 539 (1972)). Among the many proposals now before the Joint Board for consideration are recommendations for one or more certification programs whereby customers could obtain certified or approved terminal and other facilities from nontelephone company sources for direct connection to the network without the necessity of complying with the present tariff provisions that generally require that the telephone company supply network control signalling units and connecting arrangements for all direct connection of customer-provided facilities to the network. At the time we established the Board we gave no specific consideration to any questions concerning possible economic impact resulting from any further liberalization of interconnection options available to customers. Our concern at that time was to explore first the technical feasibility of possible standards and certification programs rather than the economic implications of any further liberalization of interconnection option.

8. Accordingly, in our First Supplemental Notice of April 3, 1973, in Docket 19528, we stated that we would cover economic impact questions in an appropriate manner by further supplemental notices in Docket 19528 (40 FCC 2d 315 (1973)). Furthermore, in our recent decision in *Telerent Leasing Corp. et al.*,* we stated that we intended to broaden our consideration of the economic issues as they relate to customer interconnection by instituting an investigation not only into the economic effects of any further liberalization of interconnection options to customers as proposed by many interested parties in Docket 19528, but also the economic effects which may result from currently permitted use of customer-provided facilities under the presently effective tariffs of the carriers. We explained that our decision in this regard was based upon concerns expressed by certain carriers and elements of the regulatory community that our policies on interconnection have resulted and will continue to result in certain harmful economic effects on local telephone exchange service, rates and revenue requirements. These concerns were based on the allegations that carriers are compelled to reduce their local exchange rates applicable to terminal equipment and systems in order to meet the competition for such facilities and that this would cause a loss of revenue to the carriers which prior to competition had been available to offset revenue requirements related to basic exchange service. This alleged revenue loss has been cited as mandating higher rates for such basic services, particularly service to residential and rural subscribers in order to maintain a reasonable magnitude of overall revenue to the established carriers.

9. Accordingly, one of the fundamental purposes of this inquiry is to explore fully the effects on the costs and availability of basic local telephone exchange services of (a) the regulatory actions we have taken to date on customer interconnection as reflected in the currently effective tariff provisions offering interconnected interstate message toll and wide area telephone services to customers subject to certain protective provisions initiated and devised by the telephone companies to insure against technical harm to the network; and (b) the regulatory actions we are urged to take by many parties in Docket 19528 to remove the present condition that interconnection may only be made through carrier-provided network control signalling units and connecting arrangements. As we clearly indicated in both our *Carterfone* and *Telerent* decisions we expect all parties claiming any such harmful economic effects to substantiate their contentions by showing the specific nature and extent of the economic effects alleged as a consequence of customer interconnect as presently permitted or as may be liberalized under any of the proposals in Docket 19528.

10. We also expect that each party claiming harmful economic effects of interconnection will address the question of whether the supply of customer-operated facilities is a "natural monopoly" according to accepted economic definition of that term; and if not, whether and for what reasons the Commission should consider granting a *de facto* monopoly position as being in the public interest. In our *Telerent*

*FCC 74–109; released February 5, 1974.

decision we stated our view of the underlying regulatory philosophy that should govern in this area as follows:

> "In fairness to all parties concerned, we deem it in order to state our view at this time that under a free enterprise system, particularly in this instance where there is an existing and growing competitive market for customer-provided interconnect equipment, any governmental action designed to prohibit or restrict the competitive operation of such a market would be of questionable validity and legality unless supported by compelling and cogent public policy considerations. Our purpose in enlarging the proceedings in Docket 19528 (or in a separate proceeding) will be to ascertain whether such public policy considerations are present as to warrant the extension of the natural monopoly concept to the interconnect market."

Accordingly, we expect the parties to make a factual showing as to whether, to what extent, and in what specific areas the markets for interconnect equipment and systems have the unique characteristics which would warrant relegating that market to monopoly supply by the telephone companies rather than to competitive sources of supply.

11. If the markets for interconnect equipment and systems do not have the unique characteristics which would warrant such monopoly treatment, we also solicit views as to what, if any, special conditions should be placed on telephone company participation in these markets. For example, should such suppliers of both monopoly and competitive services be required to establish separate corporate entities, maintain separate accounts, use separate operating personnel and facilities or adopt other measures to avoid the cross-subsidization of their competitive offerings by their monopoly services?

12. Finally, we invite data, information and comments from all parties on the extent to which there is or may be different or separate economic effects from customer interconnection on different groups, such as the carriers, the users (both interconnect and non-interconnect) and the independent suppliers of interconnect equipment. To enable us to assess fairly the economic implications of interconnection we need to know the benefits and costs thereof to each of these groups as well as the benefits and costs among the different members within each group. Benefits and costs of interconnection will likely be distributed differently among various classes and sub-classes of customers; and what is a cost to one group may be a benefit to another. Because of the wide variety of these many interrelationships, it would be necessary to assess the overall impact of all such interrelated benefits and costs in arriving at an optimal decision in the public interest. Accordingly, we request interested parties to submit their data and information with the foregoing in mind.

Jurisdictional separations

13. Closely related to the matters discussed above, are the concerns which we have with respect to the currently effective methods and procedures for separating and allocating plant investment and operating expenses between intrastate and interstate operations of telephone companies. We are particularly interested in the bearing that such methods and procedures have upon the carriers' operations and rates for basic exchange telephone service.

14. It has been alleged, in this connection, that under our regulatory approach to interconnection, telephone companies stand to lose a sub-

stantial portion of the station equipment market, particularly PBXs, to competitive suppliers and that this will result in substantial increases in intrastate revenue requirements thereby requiring increases in basic local exchange rates. Under the present separations procedures, the basic revenues derived by the local companies from the provision of station equipment, such as PBXs, are assigned to intrastate operations whereas a significant portion (about 18%) of the investment and expenses of station equipment are assigned to interstate operations.[2] Thus, if the telephone companies can show that they will lose a significant amount of station equipment business to competitors, their intrastate revenues would be decreased without an offsetting decrease in their investment and expenses due to separations procedures which may be improper under present circumstances.

15. In evaluating the true and actual benefits and costs of our interconnection policies, careful consideration should be given to making proper allowances for the effect of the present separations procedures thereon. Also, questions are raised as to whether and to what extent revisions should be made in such procedures to reflect appropriately under current circumstances the proportion of plant and expenses related to the interconnect market that should be assigned to intrastate versus interstate services. We, therefore, invite comments on this question.

Rate structure practices

16. We are also of the view that, in assessing the economic implications of our regulatory actions on customer interconnection and other modes of competitive choice, we should consider the extent to which the rate structures and pricing practices of the carriers and regulatory agencies affect the need for increased intrastate revenue for basic telephone exchange service and the relationship of such structures and pricing practices to these actions.

17. In this connection we addressed a letter to the Chairman of the Committee on Communications of the National Association of Regulatory Utility Commissioners (NARUC) on December 11, 1973, in which we raised certain questions about the effects of cost-insensitive rate structure, which generally apply to exchange services, on the revenue requirements for intrastate as well as interstate services. Although our principal concern in our letter to NARUC was directed to the relationship of such cost-insensitive pricing for local exchange service on jurisdictional separations procedures, we believe that the questions we raised are pertinent to questions of the economic implications of our interconnect and other competitively oriented policies. In our letter we framed the questions as follows:

a. What are the effects of existing cost-insensitive pricing practices for exchange and related local services on the consumer's usage of such plant, as compared with that to be expected from measured rate or otherwise cost-related pricing?

b. What are the corollary effects of these pricing practices and resultant usage patterns on required investment and operating expenses, and the allocation of these between state and interstate services?

[2] A portion of the toll rates in the interstate message toll tariffs is designed to recover the costs of station equipment to the extent used for interstate purposes. We would welcome comments on whether and to what extent the interstate charges for station equipment should be separately stated from the toll rates in the interstate tariffs.

c. What methods are available to convert from flat rate, cost-insensitive exchange service pricing to measured rate, cost-related pricing; what would be their costs and benefits over time; what industry plans now exist for such conversion, and what would be a realistic schedule for their implementation?

18. For example, if more liberal rules are adopted for interconnection, the result of such liberalization could cause changes in the relative usage of the exchange plant by the interconnect customers vis-a-vis non-interconnected users. Any such changes should be considered in weighing the benefits and costs of more liberalized interconnection. Moreover, the public interest might better be served by converting from flat-rate, cost-insensitive exchange service pricing to measured rate or cost-related pricing in order to prevent any unwarranted losses in intrastate revenue requirements from customer interconnection. We have reached no conclusion in this area and we solicit data, information and views on this aspect of customer interconnection.

19. We are also concerned with the contentions of certain carriers and regulatory agencies that the revenues from station equipment subsidize the basic telephone service provided to residential and rural areas. It isn't clear whether these contentions are based upon the use of fully allocated costs or some other methods of cost determination. We express no views on whether fully allocated cost or some other basis should be used in pricing interconnect equipment and systems. However, we believe that any contentions concerning alleged cross-subsidization of this nature should be accompanied by data showing the fully allocated costs thereof for comparison and testing against whatever other basis may be used for pricing such equipment. We, of course, invite the submission of all such relevant and material data and information in response to our inquiry.

ITEMS OF INQUIRY

20. In view of the foregoing, there is hereby instituted, pursuant to the provisions of Sections 4(i) and 403 of the Communications Act of 1934, as amended, an inquiry into the foregoing matter.

21. We have attempted in the foregoing paragraphs to indicate the principal areas that concern us in this proceeding and to set forth in varying terms of specificity the nature of the issues which we desire to investigate in this proceeding. However, in view of the nature and importance of the matters discussed above, it appears desirable to us that interested persons be afforded an opportunity to suggest to us what issues and sub-issues should be specified by us that will insure the development of the most meaningful and probative facts and information and material that are relevant to the questions discussed herein. We will therefore afford an opportunity for interested parties to suggest other areas or issues not discussed above which are pertinent to the general objectives of this proceeding. To this end, all interested persons are invited to submit appropriate recommendations on or before May 15, 1974. All filings in this proceeding shall conform to Sections 1.49 and 1.419 of the Rules (47 CFR 1.49 and 1.419).

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-329

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS—WINCHENDON, MASS.; PLYMOUTH AND NEWPORT, N.H.; AND SKOWHEGAN, MAINE	Docket No. 19540 RM-1791

REPORT AND ORDER

(Proceeding Terminated)

(Adopted April 2, 1974; Released April 9, 1974)

BY THE COMMISSION:

1. A Notice of Proposed Rule Making (FCC 72-603; 37 Fed. Reg. 14240) was released in this matter on July 11, 1972. The Notice proposed amendment of the FM Table of Assignments (Section 73.202(b) of the Commission's Rules) as follows:

City	Channel No.	
	Present	Proposed
Winchendon, Mass.		249A
Plymouth, N.H.	261A	287
Newport, N.H.	285A	269A
Skowhegan, Maine	286	294

The dates for filing comments and reply comments were August 14 and August 25, 1972, respectively. On August 28, 1972, Alpine Broadcasting Corporation (Alpine), licensee of Station WWMT(FM) (now WMTQ), Mount Washington, New Hampshire, filed an "Opposition to Petition by Lakes Region Broadcasting Corporation" accompanied by a letter from counsel requesting that the late-filed comment be accepted. Also on August 28, Condit Broadcasting Corporation (Condit), licensee of WLHN (AM and FM), Laconia, New Hampshire, filed a letter opposing the assignment of a Class C channel to Plymouth, and by letter of August 30, 1972, counsel for Condit requested that its late-filed statement be considered. By order released September 22, 1972, issued pursuant to a "Petition for Additional Time to Submit Reply Comments," Alpine was given until September 29, 1972, to file reply comments with respect to the proper method for determining the service area of an FM station generally, and specifically the service area of the proposed operation on Channel 287 by Lakes Region Broadcasting Corporation (Lakes Region) at Plymouth, New Hampshire. The Alpine reply comments were filed on the due date.

However, on October 10, 1972, Alpine filed a "Petition for Acceptance of Supplement to Reply Comments". Attached to the Alpine petition was a statement containing additional engineering data. Then, on October 18, 1972, Lakes Region filed a "Petition to Accept Additional Pleading" accompanied by its pleading entitled "Opposition of Lakes Region Broadcasting Corporation." Also, on October 18, 1972, WGAW, Inc. (formerly Gardner Broadcasting Co. Inc.), the petitioner for Channel 249A, Winchendon, Massachusetts, filed a "Petition for Severance and Immediate Grant of Rule Making Proposal for Winchendon, Massachusetts." On October 31, 1972, Lakes Region filed an opposition pleading to the WGAW severance and grant request, and WGAW filed a reply thereto on November 6, 1972.

2. The "Petition to Accept Additional Pleading" filed by Lakes Region will be granted because the Commission, in its Order of September 22, 1972, granting additional time for reply comments to Alpine, stated that Lakes Region could request additional time to respond to the Alpine reply comments. Because Lakes Region was able to respond to the additional engineering data filed by Alpine after the reply comment date, the Commission will also grant the Alpine request for acceptance of its supplement to its reply comments. The letter from Condit will also be considered by the Commission. Since our decision with regard to the question of whether Class C Channel 287 should be assigned to Plymouth will determine what action is necessary concerning the WGAW request for severance and immediate grant, we shall dispose of it later in this Report and Order.

3. Although the issues in this proceeding are not overly complex, the proposals to be considered herein arose out of two prior rule making proceedings (Docket Nos. 19116 and 19512). Rather than incorporate by reference, the history of the various proposals will be set forth. In the Report and Order in Docket No. 19116, the Commission, among other things, denied the requested assignment of Class C Channel 248 to Plymouth, New Hampshire, and assigned Channel 286 to Skowhegan, Maine, 32 F.C.C. 2d 549 (1971), affirmed on reconsideration, 34 F.C.C. 2d 338 (1972). In addition to filing an appeal,[1] Lakes Region (the Plymouth petitioner) filed a "Petition for Reconsideration" in Docket No. 19116 which it requested to be also considered as a counterproposal in Docket No. 19512, the proceeding in which the WGAW proposal to assign Channel 249A to Winchendon (RM–1791) was being considered. Because of the interlocking conflicts of Winchendon, Plymouth, and Skowhegan, the Commission consolidated the matters and issued the Notice of Proposed Rule Making in this docket which contains the proposed assignments set forth above. (It also severed the Winchendon proposal from Docket 19512.)

4. The key question in this proceeding is whether Class C Channel 287 should be assigned to Plymouth, New Hampshire. If such an assignment is made, it will be necessary to assign new FM frequencies to operating stations at Skowhegan, Maine, and Newport, New Hampshire. Moreover, if the proposed Class C channel is assigned to Plym-

[1] *Lakes Region Broadcasting Corporation* v. *F.C.C.*, C.A.D.C. Case No. 1381, which has been dismissed, but is subject to being reinstated.

outh, the Commission can assign a first FM channel (249A) to Winchendon, Massachusetts. If the Commission denies the assignment of Channel 287 to Plymouth, the present channels at Skowhegan and Newport will not be disturbed, and the Winchendon proposal would have to be held in abeyance pending the outcome of the appeal (as identified in footnote 1) by Lakes Region of the Commission's decision which denied the assignment of Channel 248 to Plymouth.

5. On February 13, 1974, the Commission issued an Order to Show Cause (39 Fed. Reg. 7433) directing Station WCNL–FM, Newport, New Hampshire, to show cause why its license should not be modified to specify operation on Channel 269A instead of Channel 285A, if the Commission finds it to be in the public interest to assign Channel 287 to Plymouth, New Hampshire, and to substitute Channel 269A for Channel 285A at Newport, with the understanding that the permittee of Channel 287 at Plymouth will pay reasonable reimbursement of expenses incurred in the change of channel operation of WCNL–FM. The order provided that WCNL–FM would be deemed to have consented to the modification of its channel from Channel 285A to Channel 269A, if it did not ask for a hearing by February 28, 1974, or file a written statement not later than March 7, 1974. WCNL–FM did not file anything in response to the Order to Show Cause, and the Comission finds that Station WCNL–FM has consented to the modification.

6. Sugarloaf Valley Broadcasting System, Inc. is the current licensee of Station WTOS(FM) (formerly WGHM–FM, Skowhegan, Maine, having succeeded Kennebec Valley Broadcasting System, Inc. on December 20, 1972. On July 31, 1972, in its comments, Kennebec Valley stated that "If Kennebec Valley does specify Channel 286 and builds on that channel, it anticipates that its position in this proceeding will then be that it will not oppose a later modification of license to Channel 294 provided that the ultimate occupant of Channel 287 at Plymouth, New Hampshire, is required to reimburse Kennebec Valley for the reasonable costs of the shift." This statement was confirmed in the Kennebec Reply Comments filed August 24, 1972. In a pleading filed March 7, 1974, Sugarloaf Valley refers to the Order to Show Cause mentioned above, and also sets forth that the statements of July 31, 1972, and August 24, 1972, were made concerning the substitution of channels. However, Sugarloaf Valley also states that with the passage of time there has been a change in circumstances in that a change in frequency in the early weeks would have caused only a slight disruption, but that a change at this time would have serious adverse effects on the station and listeners. It avers that there is simply no efficient way of advertising and promoting a change of frequency by newspapers, billboards or mail because of the rural and small-town character of the audience, and that the only way to notify the audience would be through on-the-air announcements at the cost of cutting established advertisers and annoying and discouraging listeners. Sugarloaf Valley also contends that, if it operates on Channel 294, second harmonic interference will result, in the area of the WTOS (FM) transmitter, to Station WGAN–TV, Channel 13, Portland, Maine, thus harming the public image of WTOS(FM) if the affected

television audience perceives that WTOS(FM) is the cause of the interference. Based on the foregoing alleged facts, WTOS(FM) submits that the Commission "should not proceed . . . on the assumption that WTOS willingly accepts a change of frequency." Sugarloaf Valley concludes by stating: "Rather, the Commission should reconsider, in the light of 1974 conditions, the feasibility and desirability of imposing such a change on WTOS and its listeners."

7. The date for filing comments has past, and except for the Order to Show Cause, the record has been closed. However, the Commission will consider the merits of the March 7, 1974, pleading by Sugarloaf Valley. It is not a withdrawal of consent to the modification. Station WTOS(FM) is the only station licensed to Skowhegan, a fact which minimizes the confusion as to the modification of the switch of frequencies. We believe that the guidelines as to reimbursement cited in paragraph 19 hereafter will enable the parties to resolve this matter. As to the question of second harmonic interference, we note that with WTOS(FM) operating on Channel 286, second harmonic signals fall into the Channel 13 band. Because of the lack of information submitted by WTOS(FM), there is no proof that second harmonic signals will cause interference to the television recepion of Channel 13 band with WTOS(FM) operating on Channel 294. The Commission finds that the contentions of Sugarloaf Valley, filed on March 7, 1974, are not of sufficient weight to cause us to consider a change of frequency by WTOS(FM) to be contrary to the public interest. We find that there has been a consent to the modification of operation of Station WTOS (FM) from Channel 286 to Channel 294 with the understanding that the permittee of Channel 287 at Plymouth, New Hampshire will pay reasonable reimbursement of expenses in the change of channel operation of Station WTOS(FM) at Skowhegan, Maine.

8. Lakes Region has submitted a detailed engineering exhibit with its comments in support of its request for the Class C Channel 287 FM assignment at Plymouth. The engineering showing is one based on the *Roanoke Rapids* case,[2] which indicates the coverage to unserved and underserved areas based on assumptions of reasonable facilities. However, the location of contours was prepared on a terrain limited basis rather than the standard prediction method generally used in such computations. Lakes Region asserts that a Class C facility at Plymouth would provide FM service to 349,743 persons within 4,234 square miles, a first FM service with signal strength equal to or greater than 60 dBu to at least 36,995 persons in 1,000 square miles and a second such service to at least 38,272 persons in 895 square miles. It is stated therein that substantially all those white and gray areas which would receive service from the Plymouth FM station are also within a standard broadcast white area during nighttime hours. Lakes Region claims that a Class A FM facility at Plymouth would serve only 7,992 persons within 145 square miles of which 6,842 persons reside within a 92-square mile unserved area, and 1,150 persons reside in a 53-square mile underserved area.

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[2] *FM Table of Assignments, Roanoke Rapids and Goldsboro, North Carolina*, 9 F.C.C. 2d 672 (1967).

9. The service computations of Lake Region have been strenuously challenged by Alpine in its reply comments. Its challenge is that the computations based on the terrain limited concept are "just not true." According to Alpine's measured contours on only two of the 29 FM stations serving central New Hampshire, the service to unserved areas is to only 3,558 persons, and to underserved areas is only 12,568 persons.

10. Our analysis of the respective showings of Lakes Region and Alpine as to service, as well as service to unserved and underserved areas, revealed that questionable assumptions had been made in certain instances by Lakes Region, and that the measurement data submitted by Alpine was deficient. The area of dispute between Lakes Region and Alpine was the location of the 60 dBu contour of Station WWMT (now WMTQ) at Mt. Washington, New Hampshire, and as a result thereof, the extent of unserved and underserved areas. Lakes Region introduced a consideration of unusual terrain features as a limit of satisfactory service, according to its interpretation of an example for deviation from the standard prediction method, by summits of what appear to be significant mountain ridges. As to the Station WWMT coverage, it selected five radials (135°, 167.7°, 180°, 195.2° and 225°) as controlling mountain ridges for depiction of the station's 60 dBu service contour. However, close examination revealed that the radials on bearing 167.7° and 195.2° traversed over discrete obstacles where the angles subtended by Copple Crown obstruction on 167.7° radial was less than 3° and by North Peak/Mt. Whiteface obstruction on 195.2° radial was less than 8°. These obstacles appeared to be more or less isolated summits, as were most of the mountains in this area, rather than mountain ridges. Thus the projection of the WWMT 60 dBu contour adjacent to these radials should have been extended farther than depicted. We are inclined to believe that the Lakes Region prediction of its proposed field strength contour, as well as the contours of existing stations and assignments, are open to question as possibly being too favorable to the proposal.

11. In opposition to the Lakes Region proposal, Alpine submitted field intensity measurements made on three radials (150°, 180° and 210°) from Station WWMT and one radial (240°) from Station WGAN–FM, Portland, Maine. The Alpine field strength measurements cannot be considered to have been properly conducted to establish the service contours of the two stations. For example, over the 210° radial from WWMT which traversed over rough terrain with a number of weak-signal receiving sites expected on the radial, Alpine made only six measurements over the 43 mile distance at uninhabited open areas along the main highways. There were at least 39 possible sites along this radial, of which 21 appeared to be in the "shadow" of terrain features or otherwise immersed in a difficult environment for good reception. Of the six sites selected, only one appeared to be representative of this type of a receiving location. By random selection, there should be at least three sites of this type in a measurement group. Further, Alpine submitted only the average values of the measurements. Normally, all test measurements should be included to substantiate the median value of the measurements at any one point. In

addition, Alpine Exhibits 1 and 2 appeared to exaggerate the difference between the "alleged" WWMT 60 dBu contour and the "measured" 60 dBu contour by depicting a portion of the location of the "alleged" contour some 30 miles farther north than shown by Lakes Region.

12. Although the Notice herein stated that we tended to agree with Lakes Region that the more appropriate method for determination of service, because of the mountainous geography in the area, was on a terrain limited rather than the prediction basis, we had reservations as to the efficacy of such a method in a rule making proceeding. As illustrated above, there are conflicting claims of the location of 60 dBu contours which raise the question as to the validity of the claim of proposed limited service. We believe that the coverage determined by the standard prediction method, which fairly represents the expected coverage in most instances, should be used in our deliberation. Since such information is not submitted in the proceeding herein, our study reveals that a station operating on Channel 287 with maximum Class C facility at Plymouth would not provide a first FM service to any area and population. However, such a station would provide a second FM service to a limited area involving about 600 persons.

13. As to utilization of the FM channel, the preclusion study shows that the assignment of Channel 287 to Plymouth would foreclose future assignments on Channels 284, 287, 288A and 290. It shows that preclusion of Channels 284, 287 and 290 are confined to limited areas; the preclusion area on Channel 284 falls near and includes Portland, Maine, where there are three Class B assignments; Channel 287 falls in Adirondack State Park, Washington County, New York; and Channel 290 falls in the region near Auburn and Lewiston, Maine, where unused Channel 261 is available but applied for, and there are two Class B assignments. Lakes Region shows that there are six Class A channels available for assignment to the various sections of the precluded area on Channel 288A, and that there are also eight channels (Class A) presently assigned, but unoccupied, to communities which are located in or bordering the precluded area and which would be available for assignment to communities in other sections of the precluded area.

14. Other factual data submitted by Lakes Region in supoprt of its request for a Class C channel is that both Plymouth and Grafton County have shown significant population growth from 1960 to 1970—Plymouth from 3,210 to 4,225 (31.6%) and Grafton County up to 54,914, a 12.8% increase. It says that Plymouth, though relatively small, is one of the largest communities in the entire area and serves as a trading and shopping center as well as a center for tourism in the entire area; that it is the home of Plymouth State College and the site of the annual state fair; and that it is the home of Sceva-Speare Hospital and the Sceva-Speare Medical Park which serve the entire surrounding area. It further sets out the names of a number of businesses located in Plymouth as well as the fact that the only motion picture theatre within a 20-mile radius is located in Plymouth. It is the headquarters of an area-wide electric cooperative whose output increased nearly 20% from 1970 to 1971 (as opposed to the national

average increase of 4.8%). It is noted that the governor of New Hampshire has announced plans for a $35 million sewage plant for the Lakes Region area which will serve towns located in the areas which Lakes Region alleged presently to be unserved and underserved areas by FM broadcast stations. Other data submitted by Lakes Region points out that the area contains 157,700 persons who are non-permanent residents who maintain second homes in the five-county (Grafton, Belknap, Carroll, Merrimack and Stratford) area and that this fact of ownership continues in an increasing trend.

15. Alpine challenges the need for a Class C channel in Plymouth through statements of its President. Alpine claims that station WWMT(FM) (now WMTQ) totally serves Grafton, Carroll and Belknap counties; that it is the key station feeding all other New Hampshire stations for the Emergency Broadcast System; that it delivers "an extremely strong signal into the Plymouth market and totally serves the Plymouth area." Alpine contends that Lakes Region is attempting to get a Class C facility to reach other New Hampshire cities which are adequately served by local and outside stations. In conclusion, the President of Alpine agrees with the Commission's decision in Docket No. 19116, in denying a Class C channel to Plymouth, at the time it assigned Channel 261A there. Information from audience surveys and a list of advertisers were submitted in support of the Alpine contentions. Condit, by letter of its Executive Vice President, opposes the Class C assignment to Plymouth on the basis that adequate service is now provided to Plymouth.

16. Upon consideration of all aspects of the Plymouth assignment, we believe that the public interest would be served by assigning Channel 287 to the Town of Plymouth.[3] Although the study shows that a Class C FM station at Plymouth would not provide a first FM service to any area and population, it would provide a second FM service to a limited number of people and would not deprive any of the communities located within the precluded areas of a channel assignment. It appears that, although the preclusion on Channel 288A would encompass some area, there are six Class A channels available for assignment to different portions of this area and that eight Class A channels are still unoccupied and assigned to communities in or bordering the precluded area and could be used at communities in other sections of the precluded area. The preclusion on the three channels is negligible. Thus Channel 287 will be assigned to Plymouth, New Hampshire.

17. There remains the question of whether to delete Channel 261A at Plymouth. Pemigewasset Broadcasters, Inc.,[4] the licensee of Station WPNH(AM), a daytime-only station at Plymouth, has filed an application for a construction permit on that channel (BPH–8110). It appears that within the area in which Channel 261A could be assigned which meets the minimum mileage separation requirements, no com-

[3] This is noted to contrast with "Plymouth Compact" which is a designation in New England for certain population groupings.

[4] Pemigewasset filed a comment herein requesting that Channel 261A be retained at Plymouth and stating that it intended to file an application for it. Pemigewasset also filed a pleading on February 28, 1974, in response to the Order to Show Cause, *supra*, in which it reaffirms its request that Channel 261A be retained at Plymouth. In view of action herein, the request is moot.

munity is located. Retention of Channel 261A at Plymouth will involve intermixing Class A and Class C channels in the same area. However, Lakes Region does not object to leaving the channel at Plymouth, provided it receives favorable consideration of its Class C proposal. Because of demonstrated interest in Channel 261A, it will be retained even though it will result in an intermixture of channels. See *FM Table of Assignments, Henderson, Kentucky*, 9 F.C.C. 2d 805 (1967), *Oxnard, California*, 10 F.C.C. 2d 865 (1967), and others.

18. Assignment of Channel 287 to Plymouth removes the legal obstacles, set forth above (paras. 2–4), to the assignment of Channel 249A to Winchendon, Massachusetts. In the Notice of Proposed Rule Making (FCC 72–430) in Docket No. 19512 (the Winchendon proposal which is consolidated herein), the Commission found that WGAW, Inc. (the petitioner) had made a sufficient public interest showing to propose the channel assignment. WGAW, Inc. on October 18, 1972, reiterated its continuing desire to have the channel assigned to Winchendon. The Commission hereby assigns Channel 249A as a first FM assignment to Winchendon. In view of the assignments, the WGAW petition for severance and grant of rule making proposal is moot.

19. There remains the question concerning reimbursement of Sugarloaf Valley Broadcasting System, Inc., the licensee of Station WTOS (FM), Skowhegan, Maine, and Eastminster Broadcasting Corporation, the licensee of Station WCNL–FM, Newport, New Hampshire, for actual costs involved in changing to the frequencies specified in this Report and Order from the party benefitting, i.e., the party receiving a construction permit for the new Channel 287 Plymouth assignment made possible by the changes. We stated in connection with the Elizabethtown, Kentucky shift that, "[i]t is well settled Commission policy that when changes in the FM Table of Assignments are made which require operating stations to change frequency, the licensees thereof are entitled to reimbursement of the actual costs of the change, from the party benefitting, i.e., the party receiving a CP on the new assignment made possible by the change." *FM Table of Assignments*, 26 F.C.C. 2d 162, 166 (1970). Guidelines setting forth the items which may be the subject of reimbursement appear in the Circleville, Ohio FM channel change, *FM Table of Assignments*, 8 F.C.C. 2d 159, 163–4 (1967).

20. In paragraphs 6, 7 and 8, *supra*, we fully discussed the question of the consent to the modifiction of the channel of operation of Station WTOS(FM) and found that there was a consent to modification with the understanding of payment for reasonable reimbursement of expenses by the permittee of Channel 287 at Plymouth, incurred in the changeover of channels by WTOS(FM). We also found (paragraph 5, *supra*) that WCNL–FM, Newport, New Hampshire was deemed to have consented to a modification of its channel of operation upon the same understanding as to reimbursement. The rule changes adopted herein are effective on the date specified below and the licenses of Station WTOS(FM) and WCNL–FM are modified accordingly, but the stations may continue to operate under their outstanding authorizations until the Plymouth permittee is ready to operate on Chan-

nel 287 or they may effect the change at any time prior thereto if they should so desire.

21. In view of the foregoing, and pursuant to authority found in Sections 4(i), 303 (g) and (r), and 307(b) and 316 of the Communications Act of 1934, as amended, IT IS ORDERED, That, effective May 16, 1974, Section 73.202(b) of the Commission's Rules, the Table of Assignments, FM Broadcast Stations IS AMENDED, to read as follows with respect to the cities listed:

City:	*Channel No.*
Winchendon, Mass.	249A
Plymouth, N.H.	261A, 287
Newport, N.H.	269A
Skowhegan, Maine	294

22. IT IS FURTHER ORDERED, That effective May 16, 1974, and pursuant to Section 316 of the Communications Act of 1934, as amended, the outstanding license held by Eastminster Broadcasting Corporation, for Station WCNL–FM, Newport, New Hampshire, IS MODIFIED to specify operation on Channel 269A in lieu of Channel 285A subject to the following conditions:

(a) The licensee shall inform the Commission in writing no later than the effective date herein of its acceptance of this modification.

(b) The licensee shall submit to the Commission by June 4, 1974, all necessary information complying with the applicable technical rules for modification of authorization to cover the operation of Station WCNL–FM on Channel 269A at Newport, New Hampshire.

(c) The Commission will notify the licensee when a construction permit has been granted for the use of Channel 287 at Plymouth, New Hampshire. The licensee may continue to operate on Channel 285A under the outstanding authorization until the Plymouth permittee is ready to operate on Channel 287 or it may effect the change to Channel 269A at any time prior thereto if it should so desire. Ten days prior to commencing operation on Channel 269A, the licensee shall submit the same measurement data normally required in an application for an FM broadcast station license.

(d) The licensee shall not commence operation on Channel 269A until the Commission specifically authorizes it to do so.

23. IT IS FURTHER ORDERED, That effective May 16, 1974, and pursuant to Section 316 of the Communications Act of 1934, as amended, the outstanding license held by Sugarloaf Valley Broadcasting System, Inc. for Station WTOS(FM), Skowhegan, Maine, IS MODIFIED to specify operation on Channel 294 in lieu of Channel 286 subject to the following conditions:

(a) The licensee shall inform the Commission in writing no later than the effective date herein of its acceptance of this modification.

(b) The licensee shall submit to the Commission by June 4, 1974, all necessary information complying with the applicable technical rules for modification of authorization to cover the operation of Station WGHM–FM on Channel 294 at Skowhegan, Maine.

(c) The Commission will notify the licensee when a construction permit has been granted for the use of Channel 287 at Plymouth, New Hampshire. The licensee may continue to operate on Channel 286 under its outstanding authorization until the Plymouth permittee is ready to operate on Channel 287 or it may effect the change to Channel 294 at any time prior thereto if it should so desire. Ten days prior to commencing operation on Channel 294, the licensee shall submit the same measurement data normally required in an application for an FM broadcast station license.

(d) The licensee shall not commence operation on Channel 294 until the Commission specifically authorizes it to do so.

24. IT IS FURTHER ORDERED, That the comment of Alpine Broadcasting Corporation filed on August 28, 1972, IS ACCEPTED; that the informal letter comment of Condit Broadcasting Corporation filed on August 28, 1972, IS ACCEPTED; that the "Petition for Acceptance of Supplement to Reply Comments" filed by Alpine Broadcasting Corporation on October 10, 1972, IS GRANTED; that the "Petition to Accept Additional Pleading" filed by Lakes Region Broadcasting Corporation on October 18, 1972, IS GRANTED; that the "Petition for Severance and Immediate Grant of Rule Making Proposal for Winchendon, Massachusetts" filed by WGAW, Inc. on October 18, 1972, IS MOOT; that the "Comments of Sugarloaf Valley Broadcasting System, Inc. filed on March 7, 1974, ARE ACCEPTED, and the requests contained therein ARE DENIED; and that the request contained in the "Comments of Pemigewasset Broadcasters, Inc." filed on February 28, 1974, IS MOOT.

25. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Report and Order by Certified Mail, Return Receipt Requested, to Sugarloaf Valley Broadcasting System, Inc., licensee of Station WTOS(FM), Skowhegan, Maine, and to Eastminster Broadcasting Corporation, licensee of Station WCNL–FM, Newport, New Hampshire.

26. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 73-923

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of APPLICATIONS FILED BY GENERAL ELECTRIC RADIO SERVICES CORP. FOR MICROWAVE AUTHORIZATIONS IN THE MANUFACTURERS RADIO SERVICE	FCC File Nos. 6562 through 6576-IX-113X

MEMORANDUM OPINION AND ORDER

(Adopted September 6, 1973; Released September 12, 1973)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; H. REX LEE, AND WILEY CONCURRING IN THE RESULT; COMMISSIONERS JOHNSON AND REID DISSENTING.

1. General Electric Radio Service Corporation (GERS) has filed applications in the Manufacturers Radio Service to operate a system of 15 operational fixed stations in the 6 GHz and 12 GHz microwave frequency bands to serve its parent corporation, the General Electric Company (GE).[1] The system will extend from New York City in the south, to Schenectady, New York in the north, and Lynn, Massachusetts, in the east, and will have a total path mileage of approximately 350 miles. The system is designed to serve all present and future needs for internal GE communications in the New England area, and at its terminal points will interconnect with leased networks serving other parts of the country. GE presently leases most of their communications facilities, and if the New England "pilot" system proves viable, an eventual nationwide microwave system is planned. Four principal types of communications traffic are planned for carriage over the system: (1) operational traffic, i.e., communications relating to GE's manufacturing activities; (2) administrative traffic; (3) sales and credit functions; and (4) computer time sharing, i.e., communications originated by third parties intended to access GE-owned computers.

2. Petitions to deny GE's applications have been filed by the Association of American Railroads (AAR), the Central Committee on Communication Facilities of the American Petroleum Institute (API), and the Utilities Telecommunications Council (UTC).[2] The primary objection[3] raised by the petitioners is that a significant portion of the communication traffic which will be carried by the GE system—specifically, all but the applicant's operational traffic—is not permissible

[1] GE's original applications were filed November 20, 1972. Amending applications were filed May 11, 1973, and it is to these amended applications that this proceeding is directed.

[2] The petitions were filed against the GE applications filed on November 20, 1972. UTC also filed a petition to deny directed to GE's amended applications filed on May 11, 1973.

[3] Petitioners also objected to GE's proposed use of bandwidth other than that permitted in the 6 GHz microwave band. However, the applicant has amended its applications to comply with the bandwidth limitations.

104-034—74——5

in the Manufacturers Radio Service.[4] They argue that permitting unauthorized communications in the heavily used 6 GHz band could encourage a proliferation of systems of the type GE proposed in degradation of the limited spectrum available in that band. Petitioners contend that GE should apply in the Business Radio Service where operations are required to be on bands above 10 GHz, and where there would be no problems with the communications proposed by the applicant.

3. In response to the petitioners' objections, GE cites findings in Docket 11866 (27 RCC 450; 18RR1786) relative to operations above 890 MHz, where the Commission stated: "In view of our determination as to the availability of frequency space and because of the impracticability of enforcement, we believe that the public interest would not be served by restricting such use to operational traffic to the exclusion of administrative traffic." Thus, GE contends that since only about 15% of its traffic—that related to sales and computer time-sharing—relates only indirectly to its manufacturing activities, such "deminimis" carriage of non-manufacturing traffic should be permitted since basic eligibility requirements for the Manufacturers Radio Service are met and the system "overwhelmingly" complies with permissible communications provisions. The applicant asks that a waiver be granted for the non-permissible communications it proposes.

4. As the applicant notes, and in accordance with the policy findings adopted in Docket 11866, a distinction is made in private microwave systems to permit the conduct of a licensee's administrative traffic in addition to the authorized operational communications. The objections raised in the petitions to deny do not persuade us to adopt a different standard for the present applications. The only apparent issue in our view concerns the applicant's sales and computer time-sharing traffic for which it seeks waiver. An outright denial of this waiver request on the basis that the operation should be conducted in the Business Radio Service above 10 GHz, as suggested in the petitions to deny, does not appear appropriate. Clearly, the applicant, GERS, is eligible in the Manufacturers Radio Service to provide radio communications service to its parent, the General Electric Company. Clearly, too, and also in accordance with findings in Docket 11866, microwave bands below 10 GHz are best suited to the long-haul type of system which the applicant proposes to operate. With respect to the sales-oriented traffic, therefore, we do not believe that the exclusion of these communications serves any vital purposes, especially considering that whether such traffic is carried or not, the same basic system will be required utilizing identical frequencies, bandwidths etc. Accordingly, we find that a waiver to permit this traffic is warranted.

5. We do not believe, however, that favorable consideration should be given to the proposal for computer time-shared communications, wherein GE-owned facilities will be accessed by third parties on a part-time basis. Carriage of this type of traffic is not treated in the

[4] Rules Section 91.728(b) provides that except for transmissions related to an immediate emergency, stations in the Manufacturers Radio Service may only transmit communications "incident to plant (operations), security, production control or materials handling other than the retail distribution of the manufacturers' product."

present rules governing private microwave operations. An inquiry [5] is under consideration by the Commission to determine to what extent delivery of a communication service to third parties should be allowed on microwave frequencies, and we determine that it is not proper to authorize this facet of GE's operations at this time.

6. In consideration of the foregoing the applications, File Nos. 6562–6576–IX–113X, submitted by the General Electric Services Corporation, for authorizations in the Manufacturers Radio Service ARE GRANTED. The Commission further hereby grants in part applicant's request for waiver of Section 91.728(b) of its rules to permit the transmission of radiocommunications related to the distribution and sales of the licensees manufactured products. Waiver is denied, however, with respect to the transmission of radiocommunications related to the licensee's computer time-sharing operations on behalf of third parties.

7. Accordingly, IT IS ORDERED, That the Petitions to Deny the above-described applications, submitted by the Association of American Railroads, the Central Committee on Communication Facilities of the American Petroleum Institute, and the Utilities Telecommunications Council, ARE DENIED. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

[5] Docket 19671—Use of the Business Radio Service for the transmission of motion pictures or other program material to hotels or similar points, released January 24, 1973.

FCC 74-326

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of JOHN LAMAR HILL, LOS ANGELES, CALIF. For Construction Permit for New FM Broadcast Booster Station	File No. BPFTB-2

MEMORANDUM OPINION AND ORDER

(Adopted April 2, 1974; Released April 10, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration the above-mentioned application (BPFTB-2) of John Lamar Hill, licensee of FM broadcast station KJLH(FM), channel 272 (102.3 MHz), Compton, California, requesting a construction permit for a new FM broadcast booster station to serve a portion of Los Angeles, California. In January 1971, at the applicant's request, an experimental booster operation was authorized and was subsequently extended for successive 90-day periods so that the station is presently operating pursuant to special temporary authority. As a condition of its continued operation of the booster station, the applicant was required to file an application for regular authority to operate the station. This application followed on May 11, 1973. On June 11, 1973, Pacific and Southern Co., Inc. (petitioner), licensee of station KKDJ(FM), channel 274 (102.7 MHz), Los Angeles, filed a petition to deny the application; on August 21, 1973, the Board of Trustees of the University of Southern California, licensee of station KUSC(FM), channel 218 (91.5 MHz), Los Angeles California, filed informal objections to the application. There followed a series of letters and pleadings by the applicant and the petitioner.[1]

2. Petitioner states that stations KJLH and KKDJ are already short-spaced with mutual interference within one another's predicted 1 mV/m contours. The booster station, it is said, is located about a mile inside the northwestern edge of KJLH's predicted 1 mV/m contour, but between a third and one-half of the area being served by the booster lies outside the predicted 1 mV/m contour of station KJLH.

[1] Petitioner filed a letter on August 16, 1973, requesting that the special temporary authority (STA) issued to the applicant be set aside; the applicant moved to strike the letter on September 25, 1973. On September 25, 1973, the applicant asked for an extension of time within which to file an opposition to the petition to deny which was opposed by the petitioner on October 5, 1973. Simultaneously, petitioner filed an opposition to the motion to strike the letter of August 16, 1973. On October 10, 1973, the applicant filed an opposition to the petition to deny and, on November 2, 1973, asked for further STA, which was opposed by petitioner on November 7, 1973. The application was amended on October 10, 1973, and petitioner filed a petition to deny the application as amended on November 8, 1973. On November 21, 1973 the applicant asked for an extension of time within which to file an opposition which was filed on November 30, 1973. Petitioner's reply thereto was filed December 5, 1973.

The applicant concedes that the area being served extends beyond its predicted 1 mV/m contour, but disputes the amount, alleging that the area represents a small fraction of the area within the predicted 1 mV/m contour. Petitioner raised other questions which we are unable to find of substance (e.g., inconsistency between street address and coordinates), but which have been cured by the amendment of October 10, 1973. The applicant has requested a waiver of sections 74.1232(e) and 74.1231(h) of the Commission's rules pertaining to the proscription against a booster's serving any area outside its primary station's predicted 1 mV/m contour. The only other question of substance which requires resolution is the applicant's failure to specify type-accepted equipment as mandated by section 74.1250(a) of the rules.

3. The Commission's rules and the *Report and Order* in Docket No. 17159 (FCC 70–1042, 20 RR 2d 1538) provide that an FM booster station will be authorized to improve reception only within the predicted 1 mV/m contour of the primary station. This is the *sine qua non* of booster operation and the restriction was articulated unequivocally in paragraph 18 of the *Report and Order, supra.* The applicant contends that the excessive coverage is *de minimis*; that no other site is available; and that the sole purpose of the booster is to "fill in"; i.e., the excess is unintentional and unavoidable. While we intend to adhere to the restrictions contained in the rules, we think that it is apparent that unique circumstances are present here which warrant a waiver of sections 74.1232(e) and 74.1231(h) of the rules. It is obvious to us that, in the Los Angeles area, an FM translator would not be technically feasible because there is simply no other frequency which the applicant could use without the very real probability of interference. The booster transmitter is located near the site of the studios of station KJLH(FM) and is intended to improve reception to listeners in that area who, but for obstructions, would be able to receive station KJLH's programming directly. The circumstances make it clear that there is no intention to expand station KJLH's coverage area, and we are persuaded that there is no practical way to contain the booster signals within the predicted 1 mV/m contour without depriving the shadowed area of the service to which it is entitled. Since the booster has been in operation for several years, it is obvious that interference is not a valid concern; there has been none. In short, we are of the opinion that there is an overriding public interest in the regular operation of this booster station and we perceive no injury, actual or potential, to anyone.

4. The applicant has not obtained type-accepted equipment (which is commercially available), nor has it attempted to obtain type acceptance of the equipment which it is using. This failure is unexplained. If, as the applicant contends, the booster equipment is performing in accordance with the Commission's standards, there appears to be no valid reason why type acceptance cannot be obtained. Accordingly, we have decided to grant the application subject to the condition that, within thirty (30) days of the date of release of this order, the applicant shall obtain type-accepted equipment or apply for acceptance of its present equipment and thereafter diligently pursue its request to a successful conclusion.

5. For the reasons stated, we find that the applicant is qualified to construct, own and operate the booster station and that a grant of the application, subject to the condition set forth below, will serve the public interest, convenience and necessity. We further find that the objector and the petitioner have raised no substantial or material questions of fact.[2]

Accordingly, IT IS ORDERED, That sections 74.1232(e) and 74.1231(h) of the Commission's rules ARE WAIVED.

IT IS FURTHER ORDERED, That the petition to deny filed herein by Pacific and Southern Company, Inc., and the informal objections filed by the Board of Trustees of the University of Southern California, ARE DENIED, and the above-captioned application of John Lamar Hill IS GRANTED in accordance with specifications to be issued and subject to the following condition:

Within thirty (30) days of the date of release of this order, the permittee shall either obtain type-accepted equipment and promptly install and commence operation of the same or apply for type acceptance of its present equipment and thereafter diligently pursue its request to a successful conclusion.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] Petitioner has stated that it does not oppose the booster *per se*, but only objects to operation in a manner not consistent with the rules.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
JOSE CRUZ CASTELLANO, Jr.
Concerning Personal Attack and Fairness Doctrine Complaints Against KOB–TV, Albuquerque, N. Mex.

APRIL 5, 1974.

Hon. JOSE CRUZ CASTELLANO, Jr.,
District Attorney,
First Judicial District,
Post Office Box 2041,
Santa Fe, N. Mex.

DEAR MR. CASTELLANO: This is in reference to your complaint, received November 29, 1973, against station KOB–TV, Albuquerque, New Mexico wherein you allege that the station has failed to comply with the Commission's personal attack rule in connection with its broadcast of certain statements on September 12, 1973. With your complaint you submitted a transcript of the editorial broadcast by KOB–TV which stated:

> Last December a sixty five year old lady was murdered . . . horribly . . . in Santa Fe . . . But the man accused of the crime will not stand trial . . . thanks to incompetency in handling the case by the District Attorneys Office . . . The State Supreme Court has ruled that Stephan Wolozan . . . the accused man cannot be tried on the charges . . . because the D. A. failed to request an extension of the period from indictment to trial . . . you folks up in the capitol city are really being looked after by District Attorney . . . Castellano . . . Is this the intent of the law . . . to allow murder without trial . . . while legal hacks debate the fine points of a chess game almost completely unrelated to a state racked with crime . . . so Mrs. Ruth Woods was murdered in December . . . who is to pay . . . nobody . . . perhaps Santa Fe needs a new District Attorney . . .

In your complaint you stated that the above editorial "attacks the 'honesty,' 'character,' 'integrity' and the personal qualities of my person"; that "the personal attack was of a controversial issue and of public importance and the presentation used on said broadcast does indeed make a personal attack upon the integrity of myself as District Attorney . . . and the broadcast was in a personal nature and attacks me professionally as well as individually"; and that KOB–TV did not, within seven days, inform you of the attack, provide you with a transcript, tape or summary, or offer you a reasonable opportunity to reply. You also enclosed a letter from the licensee dated October 10, 1973 which stated that it was enclosing a script of the editorial and "offering you the equal opportunity to appear on Eyewitness News and make a personal response."

The personal attack rule was established by the Commission to effectuate important aspects of the fairness doctrine. The fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of contrasting views in its overall programming, which includes news programs, interviews, discussions, debates, speeches, and the like. The personal attack rule is set forth in Section 73.123(a) of the Commission's Rules and states as follows:

> When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

The licensee is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, whether there is a personal attack, and whether the group or person attacked is identified sufficiently in the context to come within the rules. The Commission's role is not to substitute its judgment for that of the licensee on these matters, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. *Sidney Willens and Russell Millin*, 33 FCC 2d 304 (1972).

We are unable to conclude that the editorial constituted a personal attack within the meaning of Commission Rules and precedent. The editorial refers to the "incompetency in handling the case by the District Attorney's Office," and uses the phrase "legal hacks." Honesty, character, integrity and other like qualities applicable to the personal attack rule are characteristics which relate to the personal credibility or moral turpitude of an individual and not to the particular individual's ability or knowledge. See *Letter to Rome Hospital and Murphy Memorial Hospital*, 40 FCC 2d 452 (1973). Also, not every unfavorable reference to an individual constitutes a personal attack. See *Jack Luskin*, 23 FCC 2d 874 (1970); *Mrs. Frank Diez*, 27 FCC 2d 859 (1971). Moreover, the Commission has stated that "the statement of a particular view, however strongly or forcefully made, does not necessarily result in a personal attack." *Pennsylvania CATV Ass'n. Inc.*, 1 FCC 2d 1610 (1965).

The Commission has also stated:

> Criticism of a public official's wisdom, judgment or actions is not necessarily an attack upon his "honesty, character, integrity or like personal qualities," and we have stated that we shall not impose penalties in this area if the licensee could have had a reasonable doubt whether such an attack had taken place, or indeed in any case which does not involve a flagrant, clear-cut violation. *Letter to WCMP Broadcasting Company*, 41 FCC 2d 201, 207 (1973).

The fairness doctrine may be applicable to your complaint. However, you have not alleged that the station has not broadcast contrasting views on the issue herein in its *overall* programming, or that it has not afforded a reasonable opportunity for the presentation of contrasting views on the issue, *Allen C. Phelps*, 21 FCC 2d 12 (1969), *FCC*

Procedure Manual, 37 F.R. 20510, 20512 (1972). In this connection we note that in its letter of October 10, 1973, the station offered you time to appear and "make a personal response."

In view of the foregoing no further Commission action appears warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

FCC 74-241

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of RKO GENERAL, INC. For Renewal of License for Station WOR-TV, New York, N.Y.	File No. BRCT-71

MEMORANDUM OPINION AND ORDER

(Adopted March 7, 1974; Released April 10, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The Commission has before it for consideration: (i) the above-captioned license renewal application for Station WOR-TV, New York, New York; (ii) a timely filed petition to deny that application; and (iii) various responsive and related pleadings.

2. The American Board of Missions to the Jews, Inc. and its subsidiary, Beth Sar Shalom Hebrew Christian Fellowship, Inc. (Beth Sar Shalom), petition the Commission to deny the application of RKO General, Inc. (RKO) for renewal of license for Station WOR-TV, contending that the licensee has violated the fairness doctrine and has discriminated against the religious beliefs and teachings of the petitioners.[1] Petitioners alleged that following a meeting between several WOR-TV management personnel and its representative, Terryl Delaney who described the Beth Sar Shalom organization, the licensee contracted to broadcast a twenty-eight minute film, entitled *The Passover*, which was produced by petitioners and which depicts a Jewish family reinacting portions of the Seder ceremony with a narration explaining the history and significance of the Passover. Assertedly as a result of pressure from the Jewish community, particularly the New York Board of Rabbis, the licensee repudiated its contract and cancelled the scheduled broadcast on April 1, 1971. Petitioners submit that a significant controversy as to whether Passover is an exclusively Jewish service existed prior to the cancellation of its program and that RKO's action of April 1, 1971 constituted an abdication of its programming responsibility and contravened the fairness doctrine, even if the traditional version of the Passover was not broadcast by Station WOR-TV. It is further argued that the licensee's refusal to re-

[1] Petitioners, whose theological stance is that of Evangelical Protestantism, define their mission to include promulgating the Gospel among the Jews, ministering to Jews who have accepted Christ as the Messiah, and educating Christians in their Jewish heritage. Those who accept the religious tenets of petitioners are called Hebrew Christians. According to petitioners' director of communications, Terryl Delaney, there are eight fellowship or mission centers, such as Beth Sar Shalom, in the New York metropolitan area. Mr. Delaney estimates that there are nearly 10,000 Hebrew Christians in the service area of Station WOR-TV, albeit no membership listing is maintained by petitioners.

schedule *The Passover* for the 1972 Easter-Passover season and its failure to accord the views and beliefs of Hebrew Christians coverage similar to that extended to other religions and religious groups is discriminatory. Petitioners maintain that Station WOR–TV broadcasts Protestant, Catholic and Jewish religious programs on a fairly regular basis; however, no programs expressing the Hebrew Christian point of view have allegedly been telecast by that station.

3. In its opposition, RKO acknowledges that it did enter into a written agreement with Beth Sar Shalom for the presentation of the Passover program and that the station, through its general manager, Michael McCormick, subsequently cancelled the scheduled telecast. The reason for the cancellation, submits RKO, was the misleading nature of the program,[2] and not because of any malevolent desire to suppress the presentation of the Hebrew Christian viewpoint. Notwithstanding their initial meeting with Mr. Delaney, the licensee maintains that its management personnel were not aware that Beth Sar Shalom was a missionary organization whose program had as its purpose the conversion of Jews to Christianity. Rather, it was their understanding that *The Passover* was a modern interpretation of the ancient Jewish traditional service.[3] In an affidavit of May 26, 1972, Mr. McCormick relates that he was alerted to the station's misconception regarding the nature of the Beth Sar Shalom organization by a telephone call from a local Jewish group; that he thereupon contacted and sought the opinion of representatives of the New York Board of Rabbis with respect to the true character of Beth Sar Shalom and its Passover program; and that he was apprised of serious variances between the program and the traditional Jewish observance. Following consultations with the station's general counsel and another meeting with Mr. Delaney,[4] the WOR–TV general manager cancelled the scheduled broadcast. Mr. McCormick avers that "at no time did anyone threaten me with any boycott or pressure economic or otherwise if the program were to be carried." [5] The decision to reject the program, explains the licensee, was made in good faith and out of a concern that the station's viewers might similarly be deceived about the content of the program and its sponsors.

4. The licensee also denies that its actions have violated the fairness doctrine, arguing that the public controversy following the cancellation of the Passover program dealt with the actual cancellation by Station WOR–TV and with the misleading character of the program. In RKO's opinion, the theological issue raised by petitioners, namely, whether Passover is an entirely Jewish service, was not a controversial issue of public importance in the area. Finally, Station WOR–TV points out that it is under no obligation to accept for broadcast all

[2] According to the licensee, "the program did not present the traditional interpretation of the Seder Service which is an integral part of the Passover holiday as understood by most people of the Jewish and Christian faiths in the New York area, and * * * did not clearly call attention to the differing interpretations advanced by Beth Sar Shalom."

[3] Affidavits attesting to these statements have been submitted from WOR–TV's general manager and its general and local sales manager.

[4] At this meeting, according to petitioners, Mr. Delaney informed the WOR–TV officials of his belief that the Passover program was factual in content, albeit he acknowledged that the program "might be questioned by people of any religion other than Christianity."

[5] Similarly, the station's general sales manager states, "I was not aware of any threat of economic reprisals or boycott against WOR–TV if the station carried 'The Passover' program."

material offered it, and submits that a question of program discrimination cannot reasonably be raised by the mere fact that a particular religious sect has not received broadcast exposure.[6] In any event, the licensee disclaims any desire to prevent Beth Sar Shalom from airing another of its programs over Station WOR–TV, provided such program is consonant with the standards of the station and the Commission.

5. In reply, petitioners challenge the WOR–TV officials' claimed lack of awareness of the nature of their organization or The Passover. Once informed by Mr. Delaney that their organization was comprised of "Jews and Christians who had come to believe that Christ was the Messiah of Israel, but desired to maintain their Jewish heritage, culture and identity," those officials, in petitioners view, should have understood their organization's nature, since it is universally known that acceptance of Christ is not within the teaching of Judaism. Mr. Delaney also relates that he explained that *The Passover* was a Christian interpretation of the Seder service, setting forth how Christ used the Passover service to institute Christian communion. In any event, petitioners contend that the station's initial unawareness of the missionary character of Beth Sar Shalom is irrelevant, since Station WOR–TV could not have lawfully denied it access to the air on the same terms which are extended to Billy Graham, Oral Roberts, and other missionaries of contemporary religion. The right to express their beliefs is guaranteed by the First Amendment and by the Commission's fairness doctrine, argues petitioners, and RKO's conduct in derogation of that right renders it unfit to remain a Commission licensee. The petitioners also reiterate their contentions concerning the station's reasons for cancelling *The Passover* and characterize the station's assertion that the film was inaccurate or misleading as an eleventh-hour effort to justify its action. That Station WOR–TV exercised its "independent" judgment in this matter is belied, in petitioners' opinion, by the fact that the station sought and considered only the views of the rabbinical community, a source whose efforts to secure cancellation of *The Passover* in New York and other cities are described in newspaper and other articles submitted with petitioners' pleadings.

6. On July 1, 1964, the Commission issued a *Public Notice* advising the public and broadcast licensees of the latter's responsibilities with respect to the Commission's fairness doctrine. See "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance," 40 FCC 598, 2 RR 2d 1901 (1964). In short, the fairness doctrine requires that a station, having broadcast one side of a controversial issue of public importance, afford reasonable opportunity for the presentation of significant contrasting viewpoints on that issue in its overall programming. Where a fairness doctrine complaint is advanced, the Commission has long required that the complainant submit specific information indicating, among other things, (a) the particular issue which was of a controversial nature of public importance either nationally or in the station's service area at the time of the

[6] In this regard, the licensee maintains that petitioners' theological viewpoints are presumably expressed by those Protestant churches to which Hebrew Christians are admittedly members.

broadcast; (b) the date and the time when the station presented one position with respect to the issue; and (c) reasonable grounds for concluding that the station in its overall programming has not attempted to present contrasting views on that issue. See, *e.g.*, *Public Notice*, *supra*, 40 FCC 2d at 600, 2 RR 2d at 1904; *Radio Para La Raza*, 40 FCC 2d 1102, 1107, 27 RR 2d 836, 842–43 (1973).

7. Petitioners' showing falls far short of the required standard. That members of the Jewish community objected to the presentation of *The Passover*, that the program was opposed as a misleading and deceptive portrayal of the Seder ceremony, and that Station WOR–TV, and later other stations in various cities, cancelled the scheduled telecast are reported in the newspaper and other articles referred to in the parties' pleadings. The information before us, however, does not establish that a local public controversy centered on the broader, theological issue defined by petitioners, namely, whether the Passover was a forerunner of the Christian communion. In the absence of such indication, we cannot discount the licensee's judgment that the issue raised by petitioners was not a controversial issue of public importance in the New York area during the 1971 Holy Week season.[7] See *Mrs. H. B. Van Velzer*, 38 FCC 2d 1044 (1973); *Dr. John H. De Tar*, 32 FCC 2d 933, 23 RR 2d 966 (1972). More importantly, petitioners have failed to demonstrate that the licensee presented any material on the issue they formulated. See *Alfred M. Lilienthal*, 25 FCC 2d 299, 20 RR 2d 99 (1970). We are not persuaded that the licensee's cancellation of the scheduled broadcast, no matter how well-publicized by other New York media, constituted a use of the Station WOR–TV facilities within the meaning and purview of the fairness doctrine. As stated by the United States Court of Appeals for the District of Columbia Circuit:

> On a complaint under the fairness doctrine, the burden is not only on the complainant to define the issue, but also to allege and point specifically to an unfairness and imbalance in the programming of the licensee devoted to this particular issue. It is not enough for the complainant to allege there is a controversial issue of public importance on which the complainant wants to be heard on the licensee's station. The essential element in invoking the fairness doctrine is that the licensee has not hitherto provided fair and balanced programming on this particular issue, and therefore, and only therefore, can the complainant assert a right for someone to be heard to rectify the existing imbalance. *Healey* v. *F.C.C.*, 148 U.S. App. D.C. 383, 460 F. 2d 917 (1972).

8. In view of the above, we conclude that RKO has not violated the fairness doctrine with respect to the matter raised by petitioners.[8] We also conclude that petitioners' other accusations do not raise a substantial and material question of fact which requires resolution by way of an evidentiary hearing.

9. As a responsible religious organization in the New York area, petitioners claim a right to express their beliefs via the WOR–TV

[7] Traditionally and as a matter of sound policy, the judgment of whether a particular question is a controversial issue of public importance has been made by the licensee in the first instance. The Commission's role is to determine, upon an appropriate showing, whether the licensee abused its discretion by acting either unreasonably or in bad faith. See *Dr. David S. Tillson*, 24 FCC 2d 297, 18 RR 2d 189 (1970).

[8] In passing, it should be noted that had a material and substantial question been raised as to the licensee's compliance with the fairness doctrine in this instance, the relief requested by petitioners, namely, designation of the WOR–TV license renewal application for an evidentiary hearing, would not be appropriate. See *Westinghouse Broadcasting Co.*, 40 FCC 2d 1045, 1046, 27 RR 2d 670, 672–73 (1973).

facilities and assert that WOR–TV has denied it this right and has otherwise acted unreasonably in cancelling *The Passover* because of pressure exerted by the Jewish community. Initially, it should be pointed out that a broadcast licensee is specifically exempt under section 3(h) of the Communications Act from being a common carrier and is, therefore, under no obligation to accept for broadcast all matter which may be offered to it, whether on a paid basis or otherwise. Accordingly, except under certain circumstances not applicable here, neither the Constitution nor federal statutes guarantee petitioners the use of a microphone or a television camera for the presentation of their religious views. See *McIntyre* v. *William Penn Broadcasting Co. of Philadelphia*, 151 F.2d 597 (3rd. Cir. 1945); *CBS* v. *DNC* 412 U.S. 94 (1973).

10. Further, under Section 326 of the Communications Act, and the First Amendment to the United States Constitution, the Commission is prohibited from censoring broadcast material. Hence, the Commission does not direct broadcast licensees in their selection of particular program material, nor do we either prohibit or compel the broadcast of any particular program. Indeed, broadcast licensees have a very large area of discretion in deciding how and to what extent to deal with community problems, needs and interests. They do not have to present programming which they believe either will not serve the public interest or will not do so as well as other programming. See, *The Evening News Association*, 35 FCC 2d 366, 24 RR 2d 667 (1972); *Chuck Stone* v. *Federal Communications Commission*, 466 F.2d 316, *rehearing denied*, 466 F.2d 331 (D.C. Cir. 1972). Here, the licensee premised its action on the belief that *The Passover* was misleading insofar as the program did not clearly call attention to the differing interpretations of the Seder ceremony advanced by Beth Sar Shalom.[9] Even petitioners do not dispute that WOR–TV viewers might be misled or confused by the intertwined Jewish and Christian symbolism set forth in *The Passover* program. Nonetheless, petitioners suggest that the real motive in cancelling *The Passover* was the suppression of the Hebrew Christian viewpoint at the insistence of the Jewish community. This assertion, however, is unsupported. Petitioners, of course, have the burden of demonstrating with specificity the facts which warrant grant of the relief requested. *Chuck Stone* v. *Federal Communications Commission*, *supra*. Petitioners have clearly failed to sustain its statutory burden of presenting facts evidencing deliberate or intentional wrongdoing. On the other hand, petitioners assertion is refuted by the sworn statements of WOR–TV management personnel who attest to the absence of any threats of reprisals from the Jewish community if the station did not cancel the scheduled telecast.

[9] Many of the newspaper and other articles submitted by the parties support the licensee's opinion. For example: "There is no indication at the beginning," reports *The New York Times* in its April 2, 1971 edition, "that the film is Christian in orientation rather than a straight documentary, but gradually Christian references begin to appear." According to the April 12, 1971 issue of *Time* magazine, "Jewish criticism . . . was not so much aimed at the fact of proselytizing as at the method. Some Jews assailed the program for using their own festival in an attempt to evangelize them; others were resentful because the Christian message was slyly introduced into what first appears to be a documentary. Similarly, broadcasters were urged by the Jewish Conference on Communications Media not to present *The Passover* because "the film implies that it is an authentic representation of the Passover but actually bears no resemblance to orthodox, conservative or reform Jewish interpretations of the Seder." Thus, it was not unreasonable for the licensee to conclude that *The Passover* program was somewhat misleading.

We conclude, therefore, that an evidentiary hearing into this matter is unwarranted.

11. In view of the foregoing, IT IS ORDERED, That the Petition to Deny, filed May 1, 1972, by the American Board of Missions to the Jews, Inc. and by Beth Sar Shalom Hebrew Christian Fellowship, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-328

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of:	
RKO GENERAL, INC. (WOR-TV), NEW YORK, N.Y.	Docket No. 19991
For Renewal of Broadcast License	File No. BRCT-71
MULTI-STATE COMMUNICATIONS, INC., NEW YORK, N.Y.	Docket No. 19992
For Construction Permit For New Television Broadcast Station	File No. BPCT-4527

ORDER

(Adopted April 2, 1974; Released April 10, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) the above-captioned applications, one requesting a renewal of license to operate on channel 9, New York, New York, and the other requesting a construction permit for a new television broadcast station to operate on channel 9, New York, New York; (b) a petition to dismiss the application of Multi-State Communications, Inc. (Multi-State), filed June 7, 1973, by RKO General, Inc. (RKO); (c) an opposition, filed June 20, 1973, by Multi-State; and (d) a reply, filed July 2, 1973, by RKO.

2. On June 7, 1973, RKO filed a petition to dismiss Multi-State's appplication for a construction permit on the grounds that the application is patently defective since the applicant does not have reasonable assurance that the transmitter site would be available to it. Multi-State's application specifies as its proposed transmitter site, the present transmitter site of station WOR-TV. RKO, which leases antenna space on the Empire State Building, asserts that Multi-State never contacted RKO about whether WOR-TV's site would be available for use by Multi-State in the event of a grant of its application. Moreover, RKO states that by letter dated February 20, 1973, it advised Multi-State and the Commission that it would not assign its antenna lease to Multi-State. Consequently, RKO contends that Multi-State's continued representations to the Commission concerning the availability of its proposed antenna site raise serious questions as to Multi-State's candor. Furthermore, RKO alleges that since Multi-State's application was not substantially complete when it was filed, in that the applicant did not have a transmitter site, Multi-State is now precluded, under the Commission's "cutoff rules," from correcting this defect in its application. In opposition, Multi-State alleges that it is reasonable for it to specify the Empire State Building as its trans-

mitter site because of the uniqueness of the site.[1] Specifically Multi-State indicates that the height of the Empire State Building provides the best location for television antennas in New York City and that receiving antennas in the area are oriented toward that site. Thus, Multi-State indicates that public interest considerations require it to specify a site on the Empire State Building since operation from that site will enable the applicant to provide the best possible television service to the public. Finally, Multi-State contends that RKO's refusal to sell or lease the facilities of WOR–TV raises a question concerning the character qualifications of RKO. In reply, RKO alleges that Multi-State has failed to demonstrate that a site on the Empire State Building other than WOR–TV's present site is not available for lease or that comparable sites on other buildings are not available.

3. We are of the view that Multi-State's selection of the transmitter site specified in its application did not render the application patently defective. Initially, we note that we have previously stated that it is reasonable for an applicant to assume that a renewal applicant would be receptive to an offer to purchase or lease its site if its license were denied by the Commission. *United Television Co., Inc.*, 18 FCC 2d 363 (1969); *Central Florida Enterprises, Inc.*, 22 FCC 2d 260 (1970). Therefore, at the time that Multi-State filed its application, it could reasonably have concluded that the site specified would in all probability be available in the event of a denial of WOR–TV's license. Moreover, even if RKO should not make its present site available to Multi-State, we believe that because of the unique tower situation in New York City, a transmitter site will be available to Multi-State either on the Empire State Building or the World Trade Center Building.[2] Accordingly, RKO's petition to dismiss Multi-State's application will be denied. Furthermore, we do not believe that the conduct of RKO or Multi-State with respect to the site question warrants the specification of character qualifications issues against either party.

4. The exact amount needed to construct and operate Multi-State's proposed station for three months without revenues [3] cannot be determined on the basis of the information contained in Multi-State's application. However, cash in the amount of at least $4,240,871 will be needed as follows: down payment on equipment (cost of antenna system not included)—$756,750; two months' principal payments on equipment—$94,594; 2 months' interest payments on equipment—$17,027; three

[1] In this connection, Multi-State cites the provisions of section 73.635 of the Commission's rules which provide as follows:

"No television license or renewal of a television license will be granted to any person who owns, leases, or controls a particular site which is peculiarly suitable for television broadcasting in a particular area and (a) the site is not available for use by other television licensees; and (b) no other comparable site is available in the area; and (c) where the exclusive use of such site by the applicant or licensee would unduly limit the number of television stations that can be authorized in a particular area or would unduly restrict competition among television stations."

[2] All of the New York City television stations, including station WOR–TV, have filed applications to relocate their transmitting facilities to the World Trade Center Building.

[3] As in similar cases in the past, we will not apply the standard set forth in *Ultravision Broadcasting Co.*, 1 FCC 2d 544 (1965). Rather we will apply our former standard which required an applicant to demonstrate that it has sufficient funds to construct and operate the proposed station for three months without revenues. *Orange Nine, Inc.*, 7 FCC 2d 788 (1967). In this connection, it is noted that the Commission's TV Broadcast Financial Data Report for 1972 reveals that the New York City television broadcast stations generated revenues on an average in excess of the applicant's anticipated first-year operating costs ($10,870,000).

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months' interest payments on bank loan—$70,000; miscellaneous expenses (including grant fee of $45,000)—$585,000; and three months' cost of operation—$2,717,500. While Multi-State states that it will purchase for $100,000 the existing antenna system of the present licensee (RKO), it has failed to furnish the Commission with any information indicating that the equipment can be purchased at the price indicated. In addition, while Mutli-State indicates that the station's main studio will be located at a site to be determined in the City of New York, the applicant has not furnished the Commission with any information as to the costs associated with the construction or lease of its main studio facilities.[4] Accordingly, appropriate financial issues have been specified.

5. To meet its cash-needed requirements, Multi-State relies upon paid-in capital of $155,000, stock subscription agreements of $147,000, and a $4,000,000 bank loan. The applicant has established the availability of $138,750 in stock subscription agreements. However, the applicant has failed to show how Mr. James C. Torres will obtain sufficient funds to meet his stock subscription commitment in the amount of $8,250. Moreover, the applicant has failed to establish that it has available $155,000 in existing capital. Specifically, while Multi-State submitted an amendment on March 9, 1973, which indicated in section III, paragraph 1(c), FCC Form 301, that it had $155,000 in existing capital, it has not submitted a current balance sheet which reflects the availability of those funds.[5] Furthermore, although Multi-State has established the availability of the $4,000,000 bank loan from the Chase Manhattan Bank, the loan does not specify the collateral or security, if any, and does not, therefore, fully meet the requirements of section III, paragraph 4(e), FCC Form 301. In addition, there is no indication as to whether the stockholders will provide the collateral or security which may be required by the bank. In the event that the applicant is able to satisfactorily demonstrate the availability of all the funds upon which it relies ($4,302,000) the applicant will still need additional funds.[6] We will, therefore, specify appropriate issues.

6. On December 11, 1969, we issued an Order (20 FCC 2d 846) which designated for comparative hearing the license renewal application of RKO for station WNAC–TV, channel 7, Boston, Massachusetts, and two competing applications for construction permits. The issues included, *inter alia*, an issue to determine whether, in view of the evidence concerning alleged anticompetitive practices by RKO or its parent corporation, General Tire and Rubber Company, RKO should be disqualified to remain a licensee, or if not so disqualified, whether a comparative demerit should be assessed against it in the Boston proceeding. The issue arose out of a civil anti-trust suit filed March 2, 1967, by the Department of Justice against General Tire and

[4] The breakdown of first-year operating costs submitted by Multi-State contains a figure of $300,000 for the rental of land and building. However, it is assumed that the figure relates to the rental of the transmitter site and the transmitter building.

[5] While the application contains a balance sheet for Multi-State dated April 25, 1972, the balance sheet does not reflect the applicant's current position with respect to subscribed and issued stock.

[6] The exact amount of additional funds which will be required cannot be determined at this time since the present cash-needed figure of $4,240,871 will have to be increased by the cash required for the purchase of the antenna system and the construction or lease of the main studio facilities.

Rubber Company and three of its subsidiaries, including RKO, which alleged that they violated the Sherman Antitrust Act by conspiring to force their suppliers to purchase products and services from them.[7] The order also provided that since the allegations of anticompetitive practices were before the Commission in Docket No. 16679, in connection with the license renewal application of RKO for station KHJ–TV, Los Angeles, California, official notice might be taken of the record in the KHJ–TV proceeding and that only new or additional evidence not adduced in that proceeding might be adduced in the Boston proceeding. Subsequently, by Memorandum Opinion and Order (25 FCC 2d 633) released August 12, 1970, the Review Board added an issue to determine whether RKO violated the sponsorship identification provisions of the Communications Act and the Commission's rules with respect to the broadcast of the Della Reese Show and, if so, the effect thereof on the requisite and/or comparative qualifications of RKO to remain a licensee of the Commission. Thereafter, by Memorandum Opinion and Order (30 FCC 2d 138) released June 7, 1971, the Review Board added issues to determine whether in the course of the KHJ–TV proceeding, officers, employees and former employees of General Tire and RKO had misrepresented or concealed facts, or had been lacking in candor in their sworn testimony concerning reciprocal trade practices and, if so, whether RKO should be disqualified as a licensee in Boston, or assessed a comparative demerit. We believe that it is appropriate to specify, in the present proceeding, the three disqualification issues which have been specified against RKO in the Boston proceeding. However, in doing so, it is not our intention to have the parties to the present proceeding relitigate those issues. The record in the Boston proceeding is closed, and RKO is bound by that record. The resolution of the disqualification issues in the Boston proceeding will be *res judicata* as to RKO. Multi-State, which was not a party to the Boston proceeding, will be permitted to introduce only new or additional evidence not adduced in the Boston proceeding upon an appropriate showing that such evidence would be relevant and material to a resolution of those issues. In the event that Multi-State is permitted to adduce new or additional evidence, RKO shall have the right to offer rebuttal evidence, but only as to the new or additional evidence.

7. Except as indicated by the issues set forth below, RKO General, Inc., is qualified to own and operate television station WOR–TV, and, except as indicated by the issues set forth below, Multi-State Communications, Inc., is qualified to construct, own and operate the proposed new television broadcast station. The applications are, however, mutually exclusive in that operation by the applicants as proposed would result in mutually destructive interference. The Commission is, therefore, unable to make the statutory finding that a grant of the applications would serve the public interest, convenience and necessity, and is of the opinion that they must be designated for hearing in a consolidated proceeding on the issues set forth below.

[7] *United States* v. *The General Tire and Rubber Company, et al.*, Civil Action No. C–67–155, U.S. D.C., Northern District of Ohio. This action was terminated on October 22, 1970, by the issuance of a consent decree which precludes General Tire and Rubber Company and its subsidiaries from taking certain actions in the future without finding that they had previously engaged in such conduct.

8. Accordingly, IT IS ORDERED, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications of RKO General, Inc., and Multi-State Communications, Inc., ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to the application of Multi-State Communications, Inc.:

a. Whether James C. Torres has available sufficient funds to meet his stock subscription commitment to the applicant.

b. The amount of paid-in capital available to the applicant.

c. The cost and terms of purchase under which the antenna system will be available to the applicant.

d. The cost of rental or construction of the applicant's main studio facilities.

e. In view of the evidence adduced under issues (c) and (d), the extent to which the applicant's cash requirement will be increased.

f. The collateral, if any, for the $4,000,000 bank loan from the Chase Manhattan Bank, and whether the applicant can comply with the collateral requirements.

g. Assuming that all of the funds upon which the applicant relies will be available to it, how the applicant will obtain sufficient additional funds to be used for the construction and first three months' operation of the station.

h. Whether, in view of the evidence adduced under the preceding issues, the applicant is financially qualified.

2. To determine with respect to the application of RKO General, Inc., whether in view of the evidence concerning alleged anticompetitive practices by RKO General, Inc., or its parent corporation, General Tire and Rubber Company, RKO General, Inc., should be disqualified to remain a licensee of the Commission, or if not so disqualified, whether a comparative demerit should be assessed against it in this proceeding.

3. To determine whether RKO General, Inc., violated the sponsorship identification provisions of section 317 of the Communications Act of 1934, as amended, and section 73.654 of the Commission's rules with respect to the broadcast of the Della Reese Show and, if so, the effect thereof on the requisite and/or comparative qualifications of RKO General, Inc., to remain a Commission licensee.

4(a). To determine whether in sworn testimony given in the KHJ–TV proceeding, Docket Nos. 16679–16680, officers, employees, and/or former employees of General Tire and Rubber Company, or of RKO General, Inc., misrepresented facts, concealed facts, or were lacking in candor with regard to the existence, nature, and extent of reciprocal trade practices engaged in by General Tire and Rubber Company and RKO General, Inc.

4(b). To determine in light of the evidence adduced pursuant to the aforementioned issue, whether RKO General, Inc., should be disqualified as licensee of WOR–TV, or, alternatively, assessed a comparative demerit.

5. To determine which of the proposals would best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the above issues, which, if either, of the applications should be granted.

9. IT IS FURTHER ORDERED, That, the petition to dismiss filed by RKO General, Inc., IS DENIED.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants herein pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within twenty (20) days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-339

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
COMPLAINTS AGAINST SCREEN GEMS STATIONS, INC., STATION WVUE (TV), NEW ORLEANS, LA.
and
AMERICAN BROADCASTING COMPANIES, INC.

MEMORANDUM OPINION AND ORDER

(Adopted April 3, 1974; Released April 10, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS DISSENTING.

1. Now under consideration are: a petition filed December 14, 1973, by various individuals and organizations (petitioners) residing or located in the area of New Orleans, Louisiana; [1] an opposition filed January 28, 1974, by Screen Gems Stations, Inc. [WVUE (TV)], licensee of Station WVUE (TV), New Orleans; an opposition filed January 28, 1974, by American Broadcasting Companies, Inc. (ABC); our letter of December 20, 1973, to the petitioners; and a letter dated January 25, 1974, from the National Collegiate Athletic Association (NCAA).

2. WVUE (TV) is an affiliate of ABC, which, in turn, is the licensee of 19 broadcast stations. Among other things, the petitioners sought a ruling from us: prohibiting the broadcast of the Sugar Bowl game on December 31, 1973 on WVUE (TV) or other ABC affiliates; stating that the broadcast of the game would be contrary to the public interest; or imposing unspecified conditions on the broadcast of the game. In response, we issued our letter of December 20, 1973, in which we advised the petitioners that, in light of the First Amendment, Section 326 of the Communications Act, and our own policies, we could not issue the requested rulings.

3. Because of the press of time, our December letter did not dispose of the other matters raised in the petition. We turn to those matters now. The Sugar Bowl game is sponsored by the New Orleans Mid-Winter Sports Association (MWSA). The petitioners allege that MWSA is an all-white organization that discriminates against Black people in violation of the Civil Rights Act of 1964, as amended. The

[1] The petition will be considered as informal request for Commission action filed pursuant to Section 1.41 of our Rules. *Radio Para La Raza*, 40 FCC 2d 1102, 27 RR 2d 836 (1973). The petitioners and the organizations they represent are: Dr. Guy Gipson, President, New Orleans Chapter, National Association for the Advancement of Colored People; Mr. Carl Galmon, Public Relations Director, New Orleans Chapter, Southern Christian Leadership Conference; Ms. Betty Washington, an official of the New Orleans Urban League; Mr. Willie Montgomery, Executive Director of the A. Phillip Randolph Institute of Louisiana; Mr. Llewelyn Soniat, Advisor, New Orleans Chapter, National Association for the Advancement of Colored People's Youth Council; Ms. Yvonne Bechet, member, Black Organization of Police; Mr. Larry Jones, Director, Black Youths for Progress, and Chairman, Southern Media Coalition, New Orleans Chapter; and Ms. Brenda Thornton, Director of Alumni Affairs, Dillard University.

NCAA is also alleged to discriminate against Blacks. The gravaman of the petitioners' complaint is that ABC and WVUE(TV) aid and abet the discriminatory practices of MWSA and the NCAA. The petitioners seek: (1) an order requiring WVUE(TV) and ABC to adhere to the national policy of equal opportunity and racial justice, and to refrain from aiding, abetting and participating in schemes that are calculated to foster racial injustice; (2) an order requiring ABC and WVUE(TV) to cease and desist from lending support to entities that operate in violation of the Civil Rights Act and in violation of the Commission's Rules, presumably Sections 73.125, 73.301 and 73.680; (3) an order instituting a hearing on racially discriminatory practices, on compliance with Sections 317(b) and (c) of the Communications Act, on news distortion and suppression, on conflicts of interest, and, at the conclusion of the hearing, ordering ABC and WVUE(TV) to cease and desist from such practices or, in the alternative, ordering that their licenses be revoked; (4) an order inquiring into ABC's alleged monopoly of collegiate sports and requiring ABC to divest itself of that control; and (5) any other relief that may be deemed appropriate, including payment of reasonable attorney's fees.

4. We are in full sympathy with the petitioners' goals of equal opportunity and justice for all citizens, and have taken action to aid in achieving those goals in the communications industry. See, for example, *Nondiscrimination in Employment Practices*, 18 FCC 2d 240, 16 RR 2d 1561 (1969), adopting Sections 73.125, 73.301, 73.599, 73.680 and 73.793 of our Rules. Nonetheless, our jurisdiction is limited and alleged violations of the Civil Rights Act and the anti-trust laws by MWSA and the NCAA, neither of which is a Commission licensee, are not matters that we can resolve or adjudicate. The petitioners also raise questions as to whether the NCAA's approval of the broadcast of the Sugar Bowl game was legal and whether the NCAA's action is reviewable in court. We believe that the resolution of these problems is also outside our jurisdiction.

5. The petitioners' allegations with respect to ABC alleged monopoly of collegiate sports are primarily conclusory, and those facts that are alleged indicate only that collegiate sports attract many viewers and that networks pay large sums of money for the right to broadcast the events. Moreover, we take official notice of the facts that the rights to broadcast the various collegiate sports events are for limited periods of time, that other networks periodically compete for those rights, and that other neworks presently carry other collegiate sports, including football "bowl" games. Finally, the Justice Department has instituted proceedings inquiring into the networks' compliance with the anti-trust laws. Accordingly, we conclude that insufficient grounds have been advanced to warrant an inquiry by us into ABC's alleged monopoly of collegiate sports.

6. The petitioners allege that MWSA excludes Blacks from its membership and that it engaged in discriminatory practices in the past, such as excluding black queens from the Sugar Bowl pageant. We believe that these allegations should more properly be considered by the Justice Department or the Equal Employment Opportunity Commission. We note that the petitioners have included in their petition a copy

of a complaint filed with the EEOC by the Southern Christian Leadership Conference concerning the practices of MWSA. The petitioners also allege that the NCAA discriminates against black colleges and universities in that only two of 74 college football games broadcast during the 1973 season on either a national or regional basis were between predominantly black schools. The petitioners assert that the NCAA paid a total of $13,490,000 to its member schools from the sale of television rights, but only $300,000 of that amount went to predominantly black schools, with the remainder to schools in the eleven major conferences. These allegations do not establish discrimination, for the NCAA may have decided that the major conference teams, most if not all of which have black players, have greater appeal to television viewers. The petitioners have not alleged that other small schools or "minor" conferences receive any larger share of the proceeds or television coverage than the predominantly black schools or conferences. Moreover, in this case, we are speaking of two of numerous program sources used by licensees, and 74 out of thousands of programs broadcast each year. Based on the evidence presented here, we conclude that no action against ABC and WVUE(TV) is warranted based on their purchase of programming from the NCAA and MWSA.

7. The petitioners cite *KWK Radio, Inc.*, 34 FCC 1039, 25 RR 477 (1963), and *Pape Television Co., Inc.*, FCC 63-244, 25 RR 60 (1963) as examples of cases where we have instituted revocation proceedings based on programming. In *KWK*, a license was revoked because it was found that the Vice President-Director-General Manager of the station had deliberately perpetrated frauds on the public over the air. In *Pape*, a hearing was ordered [2] based on information and allegations that the licensee attempted to extort money by threatening to broadcast continued editorial attacks against a business. However, these cases are distinguishable in that they involved the operation of the stations themselves, not those with whom they did business. Moreover, the licensees in *KWK* and *Pape* were not making what would ordinarily be called editorial judgments, or making decisions as to which programs best serve the public interest. Rather, they were using their licensed facilities to advance their private interests by fraud or extortion. In light of the above, we conclude that no action is warranted based on the purchase of the rights for, and the broadcast of, the Sugar Bowl game and other NCAA sanctioned football games.

8. We do consider and act on allegations, directed at licensees, as to racial discrimination in employment practices, news suppression, news distortion, conflicts of interest, relinquishment of control of programming and failure to give the identification required by Sections 317(b) and (c). As to discrimination, the matters raised in the petition go to the practices of MWSA and the NCAA, not the employment practices of the licensees. Accordingly, no action is warranted based on the petition now under consideration. We note, however, that on June 6, 1973, the Southern Media Coalition filed a pleading that, among other

[2] The show-cause order was subsequently withdrawn and the proceeding terminated without a hearing, *Pape Television Co., Inc.*, FCC 63-823, 25 RR 64(a) (1963).

things, alleges that all three network-affiliated commercial television stations in New Orleans discriminate in their employment practices. We wish to make it clear that our action here in no way prejudges the merits of the issue raised in the Southern Media Coalition's petition.

9. In regard to news distortion, the petitioners characterize news as ". . . anything that is of interest to a large segment of the population." Using that definition, the petitioners assert that our policies with respect to distortion of news should be applied to the broadcast of the Sugar Bowl game, citing *Democratic National Convention*, 16 FCC 2d 650, 15 RR 2d 791 (1969), and *Hunger in America*, 20 FCC 2d 143, 17 RR 2d 674 (1969). The petitioners allege that the relationship between ABC and WVUE(TV), on one hand, and MWSA and the NCAA on the other, has resulted in the distortion of news. The petitioners state that they have presented extrinsic evidence ". . . suggesting that the parties have entered into a conspiracy of some sort . . ." and that ". . . the staging of culpable and distorted presentations of news events . . . " should be the basis for a cease and desist order or an order of revocation.

10. In opposition, WVUE(TV) notes that the petitioners have not recited one example of what they consider slanted or biased news coverage by that station. ABC, in opposition, states that it does not consider the telecast of the Sugar Bowl game to be a discussion or treatment of the controversy between the petitioners and MWSA.

11. The question whether or to what extent our policies with respect to news distortion should be applied to sports events is under study. See our Notice of Inquiry in *Practices of Licensees and Networks in Connection with Broadcasts of Sports Events* (Docket No. 19773), 41 FCC 2d 660 (1973). Even if we assume that our news distortion policies apply to the present case, it does not appear that petitioners have provided extrinsic evidence of deliberate distortion of news in connection with the Sugar Bowl game and the surrounding controversy. We have stated our policies on news distortion, slanting or staging in *Hunger in America*, and *Democratic National Convention*, above. In *Mrs. J. R. Paul*, 26 FCC 2d 591, 20 RR 2d 1223 (1969), we stated that news distortion is against the public interest, but that our role is limited by First Amendment considerations.

> Therefore, the Commission does act appropriately to protect the public interest in this important respect where we have received extrinsic evidence of such rigging or slanting (for example, testimony, in writing or otherwise, from "insiders" or persons who have direct personal knowledge of an intentional attempt to falsify news). We would be particularly concerned were the extrinsic evidence to reveal orders to falsify the news from the licensee, its top management, or its news management. (26 FCC 2d at 591–2, 20 RR 2d at 1224).

We find no allegations in the petition of the kind described in the *Paul* letter, only the conclusion that there was news distortion based on what the petitioners state was broadcast. We have specifically rejected that ground as a basis for action on our part:

> . . . we do not consider it appropriate to enter the area (of a licensee's editorial discretion) where the charge is not based upon extrinsic evidence but rather on a dispute as to the truth of the event (i.e., a claim that the true facts of the incident are different from those presented). (*Hunger in America*, above, 20 FCC 2d at 150–1, 17 RR 2d at 683).

Accordingly, we conclude that no action is warranted as to news distortion.

12. The petitioners also allege that WVUE(TV) has suppressed news of events surrounding the Sugar Bowl controversy. Although petitioners provided no extrinsic evidence of deliberate suppression, WVUE(TV) has submitted the scripts of news stories it has broadcast on the subject. Based on these scripts, WVUE(TV) asserts that in the period from August 23, 1973 to January 1, 1974, it broadcast 31 different news stories on the controversy at 39 different times on 22 days. Nine of the news stories included interviews with individuals now before us as petitioners. WVUE(TV) also alleges specific instances of offers to discuss the matter that the petitioners did not avail themselves of, discussions with the petitioners, and an offer of additional time to the petitioners to make statements to be broadcast during WVUE(TV)'s news programming that the petitioners declined to use. WVUE(TV) also states that it is preparing a documentary or panel show on the matter. We believe that the scripts of the news stories, and the number of stories broadcast on the Sugar Bowl controversy, establish that WVUE(TV) did, in fact, cover the controversy and that the extent of the coverage was well within its journalistic or editorial discretion.

13. The petitioners' allegations as to ABC's news suppression, conflicts of interest and news distortion are interwoven. (As noted above, we have concluded that no action is warranted based on news distortion.) The petitioners state that in the period from July, 1973, through the date of filing of their petition (December 14, 1973), there have been many news stories as to the all-white policies of MWSA. Letters on the topic were sent to ABC, but no information was broadcast by ABC in its news programming or on the NCAA game of the week. The Sugar Bowl game was heavily promoted by ABC, but without mention of the ". . . racist policies of the MWSA, the illegal certification of the game by *NCAA*, the game's discriminatory policies against Blacks, and, of course, the Boycott that was called by the Black Community." The petitioners cite *Gross Telecasting, Inc.*, 14 FCC 2d 239, 13 RR 2d 1067 (1968), for the proposition that a licensee editorializing on matters in which it is financially interested has an obligation to reveal the extent and nature of its private interest. A similar obligation is noted by the petitioners where a licensee's employees may have conflicting private interests, *National Broadcasting Company*, 14 FCC 2d 713, 14 RR 2d 113 (1968), *Crowell-Collier Broadcasting Corp.*, 14 FCC 2d 358, 8 RR 2d 1080 (1966). The petitioners conclude that ABC's financial interest in the game overruled its journalistic judgment and integrity, and as a result, the network did not cover the Sugar Bowl controversy.

14. Another example of news suppression, according to the petitioners, involved the 1972 Liberty Bowl game where ABC's announcers allegedly stated that a planned boycott of the game "did not occur" and the cameras showed how full the stadium was. The pickets outside the stadium were not shown and ABC's announcer stated, according to

the petitioners, that no pickets were outside the stadium.[3] The petitioners cite *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946) for the proposition that, "The fact of concealment may be more significant than the facts concealed."

15. With respect to the 1972 Liberty Bowl game, ABC states that it reviewed the tapes of the game and denies that its announcers said anything about pickets. Any reference to a capacity or near capacity crowd ". . . were statements of fact made in normal reporting context and not in any way related to picketting, boycott or protest."

16. Any time a producer, news director or editor decides not to print or broadcast a news story, he is, in a sense, "suppressing" news. However, the "news suppression" we are concerned with arises where the licensee's decision is based on private rather than public interests, a determination that must rest largely on questions of intent or motive. Because of First Amendment considerations, we believe it is inappropriate for us to make inquiry into this sensitive area in the absence of extrinsic evidence that a licensee has not been guided by the public interest standard. Our role in this area is, therefore, very limited and the licensee's discretion is commensurately broad, *Hon. Richard L. Ottinger*, 31 FCC 2d 852 (1970).[4] Since no extrinsic evidence has been alleged or submitted as to news suppression by ABC, we conclude that no Commission action is warranted.

17. As to conflicts of interest, our policy has always been in reference to conflicts between a licensee's responsibility to broadcast in the public interest and its, or its employees', nonbroadcast activities. We decline to extend that policy to promotional announcements for a licensee's or a network's upcoming programming. Moreover, where conflicts exist between private and public interest and where matters of editorial judgment are involved, one way to avoid the problem is full disclosure. This was recognized in the *Gross* and *National Broadcasting Company* cases, above. If promotional announcements are paid for, the sponsor must be identified, see Section 73.670, Note 3(b)(1)(iii). If they are not paid for and are simply network promotional announcements, it would appear obvious from the material broadcast that the network is the source of the promotional announcement. In either case, sufficient disclosure has been made.

18. In view of the above, we conclude with respect to ABC: that no extrinsic evidence has been alleged or submitted as to news distortion, slanting or suppression; that ABC is within its discretion when it

[3] As another example of a conflict of interest, the petitioners state that CBS's Pat Summerall is an announcer of National Football League games and a manager for professional athletes. He is, therefore, in a position to comment on the athletes he manages and influence audiences as to their worth. Whatever the merits of this allegation (neither CBS nor Mr. Summerall is a party to this proceeding and they have not responded), it is not relevant to the qualifications of ABC.

[4] *FCC* v. *WOKO, Inc.*, cited by the petitioners above, does not establish a different standard. In *WOKO*, the facts concealed were the ownership interests in the licensee of a major shareholder. This concealment and several misrepresentations concerning the ownership of the licensee were made in several applications and in hearing testimony. The withholding of the information and the misrepresentation went to the qualifications of the licensee based on its relationship with the Commission. The case did not concern the qualifications of the licensee based on its news judgment.

does not broadcast news of any particular event; and that our conflict-of-interest policies are inapplicable to the present case. Accordingly, no action on these matters is warranted.

19. The petitioners also allege that WVUE(TV) and ABC, by broadcasting the Sugar Bowl game, have relinquished control of their programming and have violated Sections 317(b) and (c) of the Act. The petitioners have not identified, however, any arguments or allegations of fact bearing on these issues. Because ABC pays MWSA for the right to broadcast the Sugar Bowl game, it does not appear that Sections 317(b) and (c) would be applicable. There is nothing alleged to demonstrate that ABC or WVUE(TV) have relinquished control of their programming. Only a normal relationship between program supplier and licensee can be found in the matters set out in the pleadings.

20. In formal proceedings initiated pursuant to Section 309(d)(1) of the Act, petitioners are required to allege specific facts, which, if true, would establish that the grant of an application would be inconsistent with the public interest. Informal requests for Commission action may result in investigations or in inquiries to the licensee from the Commission, followed by any action that may be appropriate in light of the investigation or response from the licensee. But where, as here, a petition that is not filed pursuant to Section 309(d)(1) seeks revocation or cease and desist hearings based on programming performance, an area heavily imbued with First Amendment considerations, we believe that more than general allegations or conclusory statements are required, *Radio Para La Raza*, 40 FCC 2d 1102, 27 RR 2d 836 (1973). While we make no judgment as to the validity of the petitioners' complaints concerning the NCAA and MWSA, we believe that the petitioners have not met their burden of pleading as to ABC and WVUE(TV).

21. Finally, we turn to the petitioners' request for reimbursement of attorney's fees. In *United Church of Christ* v. *FCC*, 465 F. 2d 519, 24 RR 2d 2001 (D.C. Cir., 1972), the court held that we could not impose a flat ban on voluntary reimbursement of a petitioner's expenses, including attorney's fees, where the agreement would be in the public interest and where the payments can be found to be legitimately and prudently expended. In this case, however, there is no voluntary agreement for reimbursement and we have held that we are without authority to compel such payments, Radio Station *WSNT, Inc.*, FCC 74–85, 29 RR 2d 625, released February 12, 1974.[5] Moreover, the licensees have not been shown to be wrongdoers, no agreement has been reached as to changes in programming policies, the local licensee has consulted, discussed and cooperated with the petitioners both before and after the filing of the petition, and there is no agreement that will facilitate the termination of litigation. Accordingly, this is not an appropriate case to award reimbursement of fees, assuming we had the authority to do so.

[5] Presumably, the petitioners would submit documentation at the end of this proceeding to show that their legal expenses were legitimate and prudent.

22. In view of the above, IT IS ORDERED, That the "Petition for Issuance of Cease and Desist Order; Commission Ruling Enjoining the Illegal Airing of the Sugar Bowl Game; and Investigation of Racially Discriminatory Practices of the Licensee and Network Regarding this Matter," filed December 14, 1973, by the petitioners, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request of
ROBERT J. LUELLEN
Concerning Equal Opportunities Pursuant to Sec. 315

APRIL 5, 1974.

Mr. ROBERT J. LUELLEN,
1521 Castle Hills Drive,
New Castle, Ind.

DEAR MR. LUELLEN: This is in response to your letters of March 12 and March 13, 1974 concerning your requests for equal opportunities pursuant to Section 315 of the Communications Act of 1934.

In your letter of March 12 you state that on January 7, 1974 Congressman David W. Dennis appeared on a local television station; that at that time you were a candidate for the Republican primary election for Congressman Dennis' seat since you had complied with "the Commission rules" by publicly announcing your candidacy; that on the filing date of February 21, 1974 you "filed with the Secretary of State and received by mail [your] Declaration of Candidacy"; and that you desired time on numerous broadcasting stations in your area.

In your letter of March 13 you stated that you were writing in reference to a letter from the Commission dated March 11, 1974 informing you that you must bear the burden of proving that both you and your opponent are legally qualified candidates; that the Secretary of State of Indiana had "guaranteed" your place on the ballot in the primary election; and that you request the Commission to bear the burden of proving that the Commission "has regulated [your] District according to its rulings."

In letters dated January 21, February 5, February 26, and March 11, 1974, we have provided you with detailed directions on the information which a complainant must provide before he will be entitled to equal opportunities under Section 315. We stated in our letter of January 21, 1974 that in order for the Commission to determine whether you are entitled to equal opportunities you must show, among other things, (1) whether a political candidate for the same office appeared in person over the station's facilities so as to constitute a use under Section 315(a); (2) whether the political candidate who appeared was, at the time of his appearance, a legally qualified candidate for public office, as determined by reference to the law of the state in which the election is being held; (3) whether the person requesting equal opportunities was a legally qualified candidate for the same office at the time of the broadcast; and (4) whether the request for equal opportunities was made within one week of the first prior use. The Commission must have specific, definite information before it can be determined whether any complainant is entitled to equal opportunities, and Commission rules require that the complainant bear the burden of providing that information.

In view of your statement that you had been "guaranteed" a place on the ballot, the Office of the Secretary of State of Indiana was contacted on March 29, 1974, in order to determine the status of your candidacy. Ms. Gail Reed, Election Deputy, informed this office that a Certified Statement of Declaration of Candidacy does not make you a legally qualified candidate, but only acknowledges your filing for candidacy. Ms. Reed stated that a candidate does not become a legally qualified candidate eligible for a place on the ballot until he is certified to the County Clerk's Office of each county in which the election is to be held, and that both you and Congressman David W. Dennis were not so certified until March 21, 1974.

Under Section 315, a candidate is only entitled to equal opportunities if both he and his opponent are legally qualified candidates and a station allows his opponent to appear in person. The only specific appearance by Congressman Dennis which you cite took place on January 7, 1974. According to the information provided by Ms. Reed, neither you nor Congressman Dennis were legally qualified candidates within the meaning of Section 315 at that time. Therefore you were not entitled to equal opportunities as a result of Congressman Dennis' January 7 appearance. You have not shown that Congressman Dennis has made any use of any broadcast station since you both became legally qualified candidates on March 21, 1974. Therefore, it does not appear from the information presently before the Commission that you are entitled to air time under the equal opportunities provision of Section 315.

Under Section 312(a)(7) of the Communications Act, as amended by the Federal Election Campaign Act of 1971, a broadcaster's license may be revoked for "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." A licensee may satisfy this obligation either by giving free time to legally qualified federal candidates or by selling time to such candidates. In either case, a licensee's compliance with Section 312(a)(7) will depend upon whether his allocation of free or purchased time was reasonable and in good faith. However you have not shown that you have been denied access to or purchase of time on any broadcast station since you became a legally qualified candidate on March 21. Moreover, it also should be explained that the Campaign Act of 1971 does not impose an absolute obligation on licensees to grant every request for time made by every legally qualified candidate for Federal elective office.

In view of the foregoing, no Commission action is warranted at this time. Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief, Complaints and Compliance Division for Chief, Broadcast Bureau.*

FCC 74-340

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request for DECLARATORY RULING by STRAUS COMMUNICATIONS, INC.; OFFICE OF COMMUNICATION, UNITED CHURCH OF CHRIST; and CONSUMER FEDERATION OF AMERICA	

MEMORANDUM OPINION AND ORDER

(Adopted April 3, 1974; Released April 10, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. The Commission has before it an Application for Review filed on October 22, 1973 by the Office of Communication, United Church of Christ, and by the Consumer Federation of America (hereinafter referred to as Petitioners).[1] Review is being sought of the September 7, 1973 ruling of the Broadcast Bureau in the above-referenced matter.

2. We have examined the pleadings herein and believe that the Bureau's ruling was correct for the reasons stated therein. However, certain matters raised in the Application for Review merit some comment.

3. In their May 14, 1973 request for a declaratory ruling regarding certain recorded announcements distributed by the National Association of Broadcasters (NAB) to its member stations, Petitioners requested Commission resolution of the following issues:

> (a) Do these announcements (the NAB spots), either singly or as a series, constitute the discussion of one side of a controversial issue of public importance within the meaning of the Commission's fairness doctrine?
>
> (b) Do these announcements require sponsor identification under Section 73.119(d) of the Commission's Rules?
>
> (c) Should these announcements be logged as commercial?

4. In denying Petitioners' request for a declaratory ruling on these issues, the Broadcast Bureau stated that the issuance of a declaratory ruling is a matter of administrative discretion and that declaratory rulings are inappropriate in matters concerning the applicability of the fairness doctrine to particular broadcasts. The staff ruling stated:

> At the core of the fairness doctrine is the licensee's obligation to make the initial determination as to whether a controversial issue of public importance is

[1] Straus Communications, Inc., which joined in the original May 14, 1973 request for a declaratory ruling, did not participate in the October 22, 1973 Application for Review.

involved and, if so, how best to present contrasting views on the issue if they have not already been presented . . . On the basis of all available information, the Commission will attempt to determine whether the licensee's actions under the circumstances can be said to be reasonable and in good faith. "The Commission acts in essence as an 'overseer' but the initial and primary responsibility for fairness balance and objectivity rests with the licensee" (citations omitted).

The Bureau's ruling further stated that Petitioners were seeking a departure from established procedures for handling fairness doctrine complaints in favor of a declaratory ruling without offering sufficient justification to warrant such special procedure. Accordingly, the staff concluded that normal fairness doctrine procedures should be followed in the instant case.

5. Petitioners' Application for Review argues that in so ruling the Bureau addressed itself solely to the first of the three issues presented by the request for declaratory ruling, and failed to render a decision on the request for resolution of the remaining two issues. They state:

It is clear that the possibility that a licensee might satisfy the complainant that he has balanced or will balance the discussion has nothing whatever to do with his obligation to identify the source of the announcement and to log it correctly. Application for Review at page 4.

6. Insofar as the Broadcast Bureau ruling disposed of Petitioners' request for a declaratory ruling on the applicability of the fairness doctrine to the NAB spots, we believe that decision also disposed of the request for a ruling on the applicability of Section 73.119(d) of the Commission's Rules to the broadcast of these spots. Section 73.119(d) of the Rules provides that:

In the case of any political program or any program involving the discussion of public controversial issues for which any records, transcriptions, talent, scripts, or other material or services of any kind are furnished, either directly or indirectly, to a station as an inducement to the broadcasting of such program, an announcement shall be made both at the beginning and conclusion of such program on which such material or services are used that such records, transcriptions, talent, scripts or other material or services have been furnished to such station in connection with the broadcasting of such program: *Provided, however,* That only one such announcement need be made in the case of any such program of 5 minutes' duration or less, either at the beginning or conclusion of the program.

It is clear that Section 73.119(d) applies only to political programs (which are not present here) or to programs which involve the discussion of a controversial issue of public importance. For reasons amply set forth in the Broadcast Bureau ruling in this matter, Commission policy has been, and continues to be, that the threshold question as to what constitutes a controversial issue of public importance is to be answered in the first instance by the licensee. The Broadcast Bureau quite properly refused to preempt licensee discretion in reaching a resolution of this question by imposing its own answers to the question on licensees at the outset. As has been often stated, the Commission's role in this area is not to substitute its judgment for that of the licensee, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. See *Fairness Primer*, 29 Fed. Reg. 10416 (1964). In the instant case, Section 73.119(d) of the Rules could be applicable only if a licensee determined that the spots in

question presented one side of a controversial issue of public importance or, under established procedure, if the Commission found unreasonable the judgment of a licensee that the spots did not present one side of a controversial issue of public importance.

7. The Broadcast Bureau also quite properly refused to render a declaratory ruling as to whether the NAB spots should be logged as commercial announcements. Note 3 to Section 73.112 of the Commission's Rules states that commercial matter includes commercial continuity and commercial announcements. A commercial announcement is defined as ". . . any other advertising message for which a charge is made, or other consideration is received." There is no evidence as to whether any licensee received consideration from or made any charge to NAB or any other party for the broadcast of the NAB spots. Consequently, a peremptory decision as to proper logging procedures for the NAB spots would not appear to be in order.

8. For the foregoing reasons, pursuant to Section 1.115(i) of the Commission's Rules and Regulations the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-308

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606(b), TABLE OF ASSIGNMENTS, TELEVISION BROADCAST STATIONS—TRAVERSE CITY, ALPENA, CHEBOYGAN AND SAULT STE. MARIE, MICH.	RM-1939 RM-1975

MEMORANDUM OPINION AND ORDER

(Proceeding Terminated)

(Adopted March 28, 1974; Released April 9, 1974)

BY THE COMMISSION:

1. The Commission has before it a petition for reconsideration of the Commission's action on August 29, 1972 (FCC 72-770) denying petitions for rule making filed by Northern Entertainment, Inc. ("Northern") and oppositions to the petition for reconsideration filed by Sault Ste. Marie Broadcasting Corporation ("SSM"), Midwestern Broadcasting Company ("Midwestern") and Thunder Bay Broadcasting Corporation ("Thunder Bay"). No reply pleading was received from Northern.

2. Northern twice petitioned for rule making seeking changes in the Table of Television Assignments in order to alleviate problems it faced as the operator of a UHF television station at Traverse City, Michigan. Essentially the same issues, presented by the same parties, as are now to be resolved were before the Commission then. Northern complains of unfairness in our resolution of the issues against it. As will be demonstrated below, we continue to believe that our previous determinations were sound, and as a result, we find no basis for reversing our earlier decision. To facilitate an understanding of the issues, we shall discuss matters on an issue-by-issue basis rather than on a basis of the separate filings of the various parties.

3. Northern operates a television station on UHF Channel 29 at Traverse City, Michigan, part of the Traverse City-Cadillac, Michigan, market. The other two stations in the Traverse City-Cadillac market are VHF stations, one operated in each of the communities.[1] No change in channel for these competitive VHF stations was contemplated in either petition. However, other communities in the Northern Michigan area would have been affected. The specific changes proposed for the communities of Alpena, Cheboygan and Sault Ste. Marie will be discussed below, but before doing so we shall briefly describe the current assignments and the general nature of the relief

[1] Channels 7 and 29 are assigned to Traverse City; Channel 9 to Cadillac.

sought. In addition to the three channels assigned to the Traverse City-Cadillac market, there are a number of other commercial assignments [2] which are involved in the present dispute. Alpena to the east northeast of Traverse City has VHF Channel 11 assigned to it. Use of this channel has been proposed but no station is now in operation. Cheboygan to the northeast of Traverse City has an operating station on its Channel 4 assignment (a satellite of WPBN–TV, Traverse City) and Sault Ste. Marie to the north of Traverse City has Channels 8 and 10 assigned, the latter currently in use by a satellite of Station WWTV, Cadillac. Under one plan, Northern would obtain a VHF channel as a result of a series of changes in area channel assignments, and under the other, Northern would continue with a UHF operation but other, now vacant, VHF assignments would be changed to UHF. Thus, one plan was designed to directly improve Northern's position and the other was intended to lessen the future impact of other area operations on Northern when they were inaugurated and was also said to foster the growth of UHF.

4. Specifically, plan one would assign Channel 4 to Traverse City for Northern's use by changing the channel of the operating station at Cheboygan, Michigan, from Channel 4 to Channel 8. This would be accomplished by removing Channel 8 from Sault Ste. Marie. No substitute VHF channel is available for Sault Ste. Marie, but there is a UHF channel which could be used there. Plan two would not change the Traverse City and Cheboygan assignments, but it would change Alpena, Michigan's only commercial assignment, which thus far is unoccupied, from VHF Channel 11 to UHF Channel 33 and change now unoccupied VHF Channel 8 at Sault Ste. Marie to UHF Channel 38. Both of the plans are premised on the asserted need to act to ameliorate Northern's situation as a UHF station operating in the Traverse City-Cadillac market in competition with two VHF stations.

5. When Northern originally filed its petitions there had been some doubt about its ability to obtain a primary ABC affiliation. It began to establish its operation with the understanding that it would have this affiliation, but it later encountered some difficulties in this regard. However, by the time we adopted our earlier Memorandum Opinion and Order, Northern had in fact acquired a primary ABC affiliation. Even so, Northern states that it is continuing to operate at a loss. It does acknowledge a reduction in the rate of loss, but says action is required lest the station become bankrupt. Thus, Northern's argument is essentially a financial one based on what it sees as the inherent differences between VHF and UHF. What it seeks to invoke is our policy of taking action to protect the ability of a UHF station to compete with VHF stations. In so doing, it has discussed the difficulties generally faced by the UHF stations and the action taken by the Commission in this regard in other cases. Underlying the question of the significance of the station's profitability or lack of it, there is some question on the record about what circumstances would need to prevail before the station could become profitable. Partly this is due to the lack of long-term

[2] There also are noncommercial educational assignments in a number of these localities, but ther do not figure in the current matter.

economic data since the station had been in operation for only two years. Northern stated in a filing against an application for the channel at Sault Ste. Marie that its actual cash losses for the first year of operation were $250,000, but for most of this period it lacked primary ABC affiliation. Nevertheless, it pointed to improvements in its financial situation and indicated that it expected a positive cash flow if no new signals or stations were added to the Traverse City-Cadillac market.

6. The dispute Northern has with our decision does not appear to center on any alleged failure to acknowledge the circumstances of the case as such. Rather, it turns on our alleged failure to recognize the significance of these circumstances which it insists requires remedial action. We cannot fail to note, however, that the principal argument on which Northern now rests its case, the Commission's policy regarding UHF impact, was raised before only by implication. It faults us for failing to deal with a series of cases applying this policy, but these cases were not cited by Northern until it filed its current petition. However, we do not intend to rely on any technical deficiencies in its earlier filings as basis for not dealing with merits of its current pleading. Instead we shall explore again and in full whether Northern's situation merits proceeding with the relief it seeks.

7. Our rejection of plan two which would change other area assignments to UHF was based on our view that overall public detriment would result. We also found it hard to see how the proposal would be likely to provide meaningful benefit to Northern. That Northern faced difficulty in competing with two VHF stations in its market was not in dispute, but neither then nor now, could we find that the establishment of VHF stations in distant communities on long existing assignments would add significantly to Northern's problem. We were offered no meaningful data to indicate that a new station in Alpena, a community more than 100 miles from Traverse City, would be so likely to cause an impact as to require deletion of the VHF channel there and the substitution of a UHF channel. The same appeared to be all the more true for Sault Ste. Marie since it is even farther from Traverse City. While we were not prejudging any of Northern's filings against applications for the channels in question, it was clear that in terms of rule making, Northern had failed to make a real case. In fact, Northern has given the matter little attention in its current petition. Against the conjectural advantages of the changes to Northern are arrayed the specific representation of the applicants in question: they would not proceed if UHF channels were substituted. In fact, Northern itself states that there was no possibility that another UHF station would be established in the area in the foreseeable future. Thus, Alpena's opportunity for a first local commercial television operation would end and so would Sault Ste. Marie's chance for a station that originally programs locally. Northern makes much of our earlier reference to providing a first local service in Sault Ste. Marie when there already is a satellite station in operation there. The intent, if not the langauge of the Commission's decision was clear. The reference was to a station originating programming locally, a matter of

some real moment. By any test, an additional service would be a gain for the Sault Ste. Marie area, something that would be all the more important if it would provide the community with its first local originations. Northern's plan would end opportunities at both Sault Ste. Marie and Alpena, consequences that we found, after balancing the conflicting interests involved, would not serve the public interest. Aside from the fact that Northern would shift the burden of trying to operate on a UHF channel to other communities where it acknowledges that the attempt will not be made, population figures suggest that the notably larger Traverse City-Cadillac market need not necessarily present a similar problem in this regard. This view is supported by Northern's expectation of a profit in the near future. We have not been shown that stations serving the distant communities of Alpena and Sault Ste. Marie would reverse this picture or that their impact would be such as to necessitate ending their opportunity for locally originated service.

8. As before, we recognize that pursuit of plan one to provide Northern a VHF channel would enhance its competitive position. Were it possible to provide a VHF channel to Northern without adverse consequences elsewhere, this approach would warrant our closest attention. The fact is, however, that as in most cases, we must strike a balance between conflicting interests. Northern's private concerns, although understandable, cannot be the basis for action contrary to the overall public interest. In this connection, Northern attacked the opinion for its observation that the situation was of Northern's own making, but the fact is that Northern chose to enter an otherwise VHF market, and nothing has happened to change the situation it knew it would face, save for the filing of applications for existing assignments in distant markets. Thus, all of the assignments about which Northern expresses concern were already in operation or at some future time could be expected to be. No new channel has been added. All that has changed is that applications have been filed for channels in communities over 100 miles from Traverse City. Aside from the large distances involved (and as a result of a reduction in their impact on the areas served by the Traverse City and Cadillac stations), the fact is that Northern should reasonably have expected the vacant channels would not remain vacant forever. Northern knew or should have known of the risks which were implicit in the commencement of operation on these channels. As will be discussed below, this is an important point to consider in connection with Northern's attempt to invoke the UHF impact policy. Even if it acted improvidently in protecting its own interest, the Commission cannot function simply as its protector. Licensees are guaranteed no profit. At most, the Commission has acted to protect UHF stations against VHF encroachment and preserve an opportunity for UHF stations to compete.

9. Northern offers a showing of gains and losses which it asserts would result from its change to a VHF channel and the related change of the Cheboygan station from Channel 4 to Channel 8. It concludes that overall there would be a net gain in the population included in the respective Grade A contours of the stations and that the gain in its own

Grade B contour would more than compensate for any loss in Cheboygan's Grade B contour. The net Grade B gain (Traverse City's gain, as reduced by Cheboygan's loss) would be 72,622 persons according to Northern. Northern states that if the Commission considers the loss to Cheboygan to be significant, that station could increase its antenna height by 235 feet and thereby equalize its Grade B coverage and in the process produce a net gain in its Grade A coverage. Northern expressed a willingness to "explore the sharing of costs" for such a change.

10. Northern's gains and losses argument is defective on a number of points. It is by no means certain that an increase in facilities of the Cheboygan station would be possible. In fact, because of a Canadian short-spacing, the opposite is to be expected. Nor is this question to be addressed as simply a numbers game with gains and losses totalled. Some gains and losses mean more than others, and the costs of obtaining gains may outweigh their advantages. These points are ignored. Finally, Northern's gains could be achieved by a simple power increase on its present channel without any of the problems which would attend its proposal. That Northern does not prefer such a course of action cannot be determinative.

11. In effect then, Northern asks us to count its gains as if this were the only way to achieve them and to discount the losses to the Cheboygan station. This we cannot do. Because of the differences between high and low band VHF, the net result for Cheboygan, if all else but channel remained the same, would be a loss in Grade B coverage. It is true that Grade A coverage would improve, but an improvement in signal level to those already served does not compensate for a loss of a present service to those in great need of it. In effect, then, we are asked to give great importance to Northern's gain even though it is otherwise obtainable and to ignore the losses even though the consequences overall be serious. Northern views such an approach as consistent with our mandate under Section 307(b) of the Act, but that is clearly not so.

12. Separately, though, we need to consider whether protection or remedial action, even if not otherwise required, is required by our UHF impact policy. According to Northern, we ignored the requirements of this policy and acted in a manner contrary to the cases it has subsequently cited. Our reasons for not dealing with the subject explicitly and at greater length were simple: Northern did not properly raise it and in any event, the policy does not apply. In the cases cited by Northern [3] and otherwise, the UHF impact policy has as its intent, the avoidance of VHF encroachments. None of the cases went beyond considering new VHF assignments or expanded VHF stations. Thus, we are at a loss to see what encroachment Northern has in mind. Even if we assumed that the policy were applicable to already existing assignments and not just to new ones, we would need a showing that the assignments in question would not be consistent with the UHF impact

[3] Thus, *Greylock Broadcasting Co.* v. *U.S.*, 231 F. 2d 748, 13 R.R. 2082 (D.C. Cir. 1956) involved a further VHF allocation and *WLVA, Inc.* v. *F.C.C.*, 49 F. 2d 1286, 23 R.R. 2d 2081 (D.C. Cir. 1972) involved improved VHF facilities. See also the cases cited by the Court in *WLVA, Inc.*

policy. The fact is that Northern has not made any such showing of necessary conflict. Even so, such impact can still be considered in terms of the particular applications which have been filed. Northern objected to the view that the question was one to be resolved in terms of any pertinent applications, although Northern in fact has opposed those on file at Alpena, and Sault Ste. Marie. Northern considers this approach time-consuming and expensive, but it fails to recognize the advantage of a hearing in obtaining the necessary data, assuming a threshold showing has been made. This is especially true when no new assignments are being proposed, the only question being retention of the status quo. Since there is no further expansion of VHF at issue in a rule making context, the policy is inapplicable here. The Court of Appeals in *WCOV, Inc.* v. *F.C.C.*, 150 U.S. App. D.C. 303, 464 F. 2d 812 (1972) affirmed the Commission's decision that adverse UHF impact was outweighed by the need to provide a market with local television service and it acknowledged that the policy has lost some of its weight when balanced against other competing Commission policies.

13. While the advantage to Northern of having a VHF operation is clear, this is not the only point to consider. We cannot ignore the fact that accommodating Northern's request would have a series of consequences. It would necessitate a change in channel for the existing operation at Cheboygan from Channel 4 (VHF low band) to Channel 8 (VHF high band). More than the costs of the channel change, considerable in themselves,[4] would be involved. Were only the channel to be changed, there would be a short-spacing with an operating Canadian station. Aside from Northern's conjecture that Canada would accept this situation, even if it were to be true, one of two consequences would develop. Either the Cheboygan station would have to change its site, or if Canada were to agree, the station would have to restrict its facilities. If the latter, it could do so through an overall reduction or (more expensively) use directionalization to restrict power only toward the Canadian station. Our policy regarding requiring a station to change site as well as channel was expressed in the denial[5] of an FM petition for rule making that could have brought a large improvement in the coverage of a Philadelphia FM station. Notwithstanding the gain which the petitioner said would result if another station were required to change site and channel, we refused to implement the proposal because of our conclusion that it would be detrimental to the public interest. Moreover, in that case, unlike this one, the moving party was ready to make full reimbursement, so that the financial burden imposed was not at issue as it is here. Northern's willingness to provide full reimbursement is anything but clear. Although the facts differ and that was an FM proceeding, we think the reasoning is equally applicable here. Just as in that case, we know nothing about the availability of land, its cost or its suitability for use. Indeed, the situation is full of unknowns and that fact (as well as cost) was at the core of our concern. Restriction on a station's facilities is also a

[4] Northern expresses a willingness to consider sharing the cost involved, but this falls short of a commitment to do so and clearly does not constitute an agreement to reimburse the full costs of making the changeover.

[5] *GCC Communications of Philadelphia, Inc.*, 42 F.C.C. 2d 414 (1973).

matter of considerable importance. This is not the case of a party's willingness to accept a restriction as part of an arrangement to provide an overall benefit. There is no compensatory gain to the Cheboygan station here, and even more important, the public in the affected area would lose a service it now receives. This becomes all the more important because of the paucity of signals in this area. This is not simply a matter of the private equities of the Cheboygan station (however considerable they may be) but one of direct public detriment through loss of service.

14. Recognition also has to be given to the fact that the effects of Northern's plan two extends to Sault Ste. Marie as well, where a proposal for local service would be abandoned because of an unwillingness to operate on the UHF channel which would have to be substituted. Sault Ste. Marie now has only a satellite station that does not originate programming locally. The loss of this proposed service is a matter of some moment. Likewise, there would be an impact on Alpena where there is now no station and if the assignment became UHF, there would be no station established. What can be seen, is that this is not the simple case of responding to Northern's understandable desire to improve its competitive position. We would be prepared to respond were it not for the far reaching implications of such action. The effect of plan one would be to benefit Northern and visit its problems on Sault Ste. Marie and Alpena, to disrupt the Cheboygan station and lessen its coverage in just the area where it is most needed. To Northern this may look fine, but from an overall public interest standpoint, it is a poor bargain indeed. Plan two would not bring Northern any real benefit but it would have harmful consequences elsewhere which have not been justified. This does not mean that Northern may not improve its current situation, as it may seek to improve its facilities and thereby extend its coverage area.

15. In sum we find no basis for altering our previous conclusion that it would not be possible to respond to Northern's urgings without by so doing causing harmful public interest consequences. That being the case, its petition for reconsideration will be denied.

16. Accordingly, IT IS ORDERED, That the subject petition IS DENIED and our previous rejection of the rule making petitions (RM–1939 and RM–1975) IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-322

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re WESTERN TV CABLE CORP., SALT LAKE CITY, UTAH For Certificate of Compliance	CAC-61 UT005

MEMORANDUM OPINION AND ORDER

(Adopted April 2, 1974; Released April 11, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. On February 7, 1973, we granted a Certificate of Compliance to Western TV Cable Corporation to add carriage of three television broadcast signals to its existing cable television system in Salt Lake City, Utah.[1] Now pending is a petition for reconsideration of that grant filed by Community Television of Utah, Inc., a competing cable television system in Salt Lake City.[2]

2. In its reconsideration petition, Community Television alleges that newspaper reports indicate that at approximately the same date the Certificate of Compliance was granted to Western TV Cable by the Commission, ownership or control of that company changed hands.[3] This situation is said to raise both a trafficking question and, because the change in ownership was not approved by local authorities, a question of whether Western now has a valid cable television franchise for Salt Lake City. Community Television asks that we set aside the Certificate grant and conduct a full inquiry in order to answer the following questions:

(1) What effects will the transaction have on Western's obligations under Section 76.31 of the Rules?
(2) Is the option (and would an exercise thereof) be inconsistent with Section 76.31(a)(1) of the Rules?
(3) Was Western the "real party in interest" to the certificate of compliance application or was the real applicant the newly-formed general partnership comprised of Western's parent and Cadco?
(4) Does that general partnership, as a matter of law, hold a valid franchise from the City of Salt Lake? Does Western?

3. Western TV Cable has responded, stating that the facts as to ownership are as stated in the reconsideration petition, that it has

[1] FCC 73-152, 39 FCC 2d 624.
[2] A petition for stay of that decision was also filed by Community Television of Utah. Consistent with our decision herein that petition will be dismissed as moot.
[3] According to information supplied by Western TV Cable Corporation in its reply to Community's petition for stay, Western was purchased by and is now a wholly-owned subsidiary of Globe Incorporated, a publicly held corporation. Globe "has formed an equal partnership with Cadco of Utah and they plan to form a limited partnership to finance the expansion of Western's cable system in Salt Lake City. Viacom International, Inc., will supervise the construction and operation of the system. Viacom International, Inc., has a call to acquire, and can be required by Globe, Inc., and Cadco of Utah to acquire Western."

been in touch with the appropriate local authorities in Salt Lake City concerning the matter and has been advised that the City wishes to be apprised of the full circumstances involved in any ownership change but has no intention "to withdraw at this point the granted franchise because of a mere technical violation of the franchise provisions," that the Commission has left authority for selection and control of cable television franchises up to local authorities, and that the Commission in other proceedings has refused to hold in abeyance applications for certificates of compliance while a franchising authority decides whether to re-examine a franchisee's qualifications. *Eastern Connecticut Cable Television, Inc.*, FCC 73–346, 40 FCC 2d 405. Finally, it is urged that because the Western TV system in Salt Lake City was in operation prior to March 31, 1972, the franchise standards of Section 76.31 of the Rules have no application to this system until March 31, 1977.

4. In addition to the pleadings formally filed in this proceeding, a letter has also been received from the Office of the City Attorney of Salt Lake City. The essential portion of this letter states as follows:

> The facts as set forth in Western's opposition to petition for reconsideration are essentially correct. The City Commission has, however, required that Western furnish the City with a list of the stockholders of Globe, Inc., who own more than five percent of the outstanding stock of Western before ratification of that transfer takes place and also that it furnish said Commission with the full particulars of this arrangement, both present and future, with Viacom International.
>
> Section 20–11–2 of the Revised Ordinances of Salt Lake City, 1965, provides that all franchises are deemed to be non-assignable without the express permission of the Board of Commissioners and we have taken the position that if, in fact, control of the corporation passes to another that this would amount to a transfer of the franchise, hence the present controversy. All the City is really concerned with at this point is full disclosure of those with whom the City now deals in terms of control. It is not the posture of the City to revoke a franchise once granted unless it clearly appears that the actions of the grantee (in this case alleged "transferee") are not in the best interests of the citizens of the City.
>
> This information is submitted for purposes of clarification only and it is not to be construed as an attempt by Salt Lake City to buttress or support the positions of either Western or Community in the matter presently before the Commission.

5. Section 76.31(a) and 76.31(a)(1) of the Commission's Rules state:

> (a) In order to obtain a certificate of compliance, a proposed or existing cable television system shall have a franchise or other appropriate authorization that contains recitations and provisions consistent with the following requirements:
>
> (1) The franchisee's legal, character, financial, technical, and other qualifications, and the adequacy and feasibility of its construction arrangements, have been approved by the franchising authority as part of a full public proceeding affording due process. . . .

The requirements of this and other provisions of Section 76.31, however, do not apply to any cable television system that was "in operation prior to March 31, 1972, until the end of its current franchise period, or March 31, 1977, whichever occurs first."

6. Western TV Cable was in operation prior to March 31, 1972, and, hence, consistency with this section of the rules is not now required Thus, in our action granting Western TV Cable a Certificate of Compliance to add additional broadcast signals, Western's operations and franchise were not compared with the requirements of Section 76.31

to determine consistency therewith. Information permitting such a comparison to be made was neither filed nor required to be filed with its application. Section 76.13(b). Such a review not being required by the rules and not otherwise having been undertaken prior to granting Western TV's Certificate application, we see no reason or, indeed, authority for doing so now on reconsideration of that decision.

7. Further, to the extent Community TV's reconsideration petition suggests we conduct further proceedings looking into Western TV Cable's qualifications or attempt some *ad hoc* application of broadcast station "trafficking" standards in this situation, we decline to do so. We have, in our regulation of cable television, left the matter of franchisee selection almost entirely to local authorities. Although, as indicated above, questions have been raised at the local level as to whether Western TV Cable's franchise should be revoked, it appears that Western had at the time of the Certificate grant and continues to have an unrevoked franchise granted by Salt Lake City. We see no need to speculate as to what action the City may take in this regard or to anticipate that the franchise will be revoked. This is appropriately a matter for decision at the local level. Accordingly, because no present compliance with Section 76.31 of the Rules is required, because Western TV Cable's operation is not in conflict with any rule of the Commission, and because no reason has been suggested why the City of Salt Lake is not the appropriate authority to review and consider the appropriateness of the ownership change that appears to have taken place, we will deny Community Television of Utah's petition for reconsideration.

Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed March 16, 1973, by Community Television of Utah, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Stay of Grant," filed February 27, 1973, by Community Television of Utah, Inc., IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-331

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF E. BOYD WHITNEY, RADIO STATION KRZE, FARMINGTON, N. MEX.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted April 2, 1974; Released April 10, 1974)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Memorandum Opinion and Order adopted March 13, 1973, 40 FCC 2d 211 (1973), and (2) the licensee's application for mitigation or remission of forfeiture dated April 9, 1973.

2. The Memorandum Opinion and Order for forfeiture in the amount of one thousand dollars ($1,000) was issued in this proceeding to E. Boyd Whitney, licensee of Radio Station KRZE, Farmington, New Mexico, for repeated failure to abide by the provisions of the station license and repeated violation of Section 73.87 of the Commission's Rules in that the station was operated during presunrise hours without authority.

3. In the application for mitigation or remission of forfeiture, the licensee incorporates by reference a letter submitted by his attorney in response to the Notice of Apparent Liability in this proceeding. Further, while admitting the possibility that the violations may have been repeated, the licensee states that the violations were not willful in that when he became the licensee on December 14, 1967 he "inherited the presunrise situation" because his predecessor had operated during presunrise hours pursuant to a 1966 telegram from the Commission. However, as fully discussed in the Memorandum Opinion and Order of March 13, 1973, issued in this proceeding the Commission's November 1, 1966 telegram was issued prior to the amendment of Section 73.87 and the adoption of Section 73.99 of the Rules and specifically advised that the authorization to operate was only "until resolution of matters involved in Docket 14419 . . ." which was the proceeding which effected the amendment of Section 73.87 and the adoption of Section 73.99.

4. The circumstances surrounding the violations, as related by the licensee, were considered by the Commission prior to adoption of the Memorandum Opinion and Order of March 13, 1973, wherein we found that the violations were repeated and that, having so found, it was unnecessary that we make an additional finding as to willfulness. Although the licensee is now applying for reduction in the amount

of forfeiture or remission he cannot avoid the responsibility for serious violations of long duration solely because of the lack of willfulness. *Storz Broadcasting Co.*, 45 FCC 58 (1962). Considering all of the circumstances in this case, we are not persuaded to remit the forfeiture or mitigate the amount thereof.[1]

5. Accordingly, IT IS ORDERED, That the application for mitigation or remission dated April 9, 1973, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[1] The licensee also states that he received a Presunrise Service Authorization on December 18, 1972. However, the date licensee obtained the Presunrise Service Authorization has no decisional significance in view of the fact the authorization was received 16 months after the last violation involved in this proceeding.